

A Social Ontology of the Wage



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Summary

This thesis draws on the theory and method of social ontology to explore why labour law struggles to provide for wage security and clarity of employment status today. It starts by exploring at a conceptual level the relationship between law and capitalism, before moving on to engage more specifically with the concept of the wage, situating the analysis in a theory of the wage's socio-economic function.

The thesis understands the 'wage' as, initially, the market price of the commodity, 'labour power', which is exchanged in the labour market. As with any other 'price', the wage functions to coordinate decision making in the market. At the same time, however, the wage is also the cost of reproducing that commodity, a process which is not confined to the market but takes place in society more generally: this is the function of social reproduction. These two functions are not only conceptually and materially distinct; they are frequently in conflict. The price the market assigns to the labour commodity is not always, and not necessarily, that which is required to cover its costs of (re)production.

The thesis shows that these functions of the wage find their expression in the various concepts the legal system uses to describe the payment made by employers to their workers. For example, the legal concept of the 'wage' corresponds closely to the economic idea of the wage as price, and the concept of 'remuneration' to the wage as the cost of social reproduction, shifting some of the social costs of employment onto the employer. How these conceptual tools are deployed, however, and thus how effectively these functions are performed in practice, depends on law's own view of its ontological status: that is, the implicit position that the legal system takes on what constitutes 'social reality' beyond the text of a particular case

or statute, and thus its view of whether, and to what extent, legal concepts can shape, as well as respond, to it. The thesis shows that whether the legal system sees its concepts playing an active role in constituting social and economic relations, or whether it sees them as passively reacting to the 'demands' of a 'pre-constituted' economic system makes a difference to the effectiveness of law in practice. Understanding law's implicit ontology in this sense helps us to see why labour law struggles to provide for wage security and clarity of status. Thinking about law's relationship with social reality can thus make an important contribution to our understanding of the problems of low pay and unclear employment status today.

Preface

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in this Preface and specified in the text.

It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my dissertation has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text.

This thesis, including footnotes, does not exceed the permitted length: 79,771. The thesis does not exceed the permitted total (including footnotes, bibliography, and preliminary matter): 98,813.

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A Social Ontology of the Wage

‘We study history not to know the future but to widen our horizons, to understand that our present situation is neither natural nor inevitable, and that we consequently have many more possibilities before us than we imagine.’

— Yuval Noah Harari, *Sapiens: A Brief History of Humankind*

‘After all, if you do not resist the apparently inevitable, you will never know how inevitable the inevitable was.’

— Terry Eagleton, *Why Marx Was Right*

‘The widely-accepted assertion that, only if you let markets be will everyone be paid correctly and thus fairly, according to his worth, is a myth. Only when we part with this myth and grasp the political nature of the market and the collective nature of individual productivity will we be able to build a more just society in which historical legacies and collective actions, and not just individual talents and efforts, are properly taken into account in deciding how to reward people.’

— Ha-Joon Chang, *23 Things They Don't Tell You about Capitalism*

INTRODUCTION

1. Plan of the Thesis

Low pay and a lack of clarity over employment status are some of the most pressing problems facing workers today.¹ Nonetheless, as is clear from a recent government review into modern working practices, labour law often seems incapable of providing meaningful responses to these problems.² Explanations often given for this failure include: political factors, such as a general reluctance to interfere with the parties' freedom to contract; doctrinal factors, a perception that legal concepts are unnecessarily rigid and confusing; enforcement problems linked with the limits inherent in the employment tribunal system and how this interacts with workers' inequality of bargaining power; and/or economic factors such as market fluctuations and/or changes in technology.³

This thesis will argue that the reasons for labour law's failure to provide for wage security and clarity of employment status actually run much deeper. It will suggest that a significant part of the problem is to be found at the level of the language used in labour law discourse to describe and construct the employment relationship and its central features, including the wage.

The thesis will develop an ontological framework to explain why conceptual language matters in general for the effectiveness of labour law, and a genealogical approach to show how particular concepts have evolved to give legal expression to the social and economic functions of the wage. It will show how making explicit the ontological assumptions underpinning labour law analyses, while revealing the complex genealogies of legal terms, can inform the process of law reform.

¹ Taylor 2017, 36.

² Taylor 2017.

³ McGaughey 2017; Moyer-Lee 2017.

Taking this approach, the thesis will use the theory and method of social ontology as a frame through which to explore the problems of low pay and unclear employment status. Three levels of analysis will be presented. First, the thesis will draw on the critical realist approach to social ontology to direct attention to the role that a genealogical analysis can play in clarifying legal concepts, helping to clear out misunderstandings that become embedded in concepts such as the ‘wage’ and the ‘employee’ over time. Second, it will explore the legal system's own implicit ontology, that is to say, the conception, implicit in legal discourse, of its role in relation to society, and how far it sees its concepts as reflecting, or constituting, social relations. The thesis will suggest that, while judges do not necessarily think of law as having an ontological position, it is inevitable that law takes a position on what constitutes ‘social reality’ beyond the text of a case or statute, and, as such, on the law’s own role in shaping it as well as responding to it. The thesis will endeavour to uncover this ontology, through a close examination of legal discourse, and in this way, reveal some of the limitations and contingencies, but also capacities, of the law as a mode of regulation. The final level of analysis will use insights from the critical realist approach to social ontology to address the broader question of law’s relationship with capitalist social relations, showing the potential contribution that such an approach can make to the legal field.

2. What is Social Ontology and Why is it Relevant to Law?

Ontology is the study of what exists and how; the study of being. It is distinct from, but naturally leads to a perspective on, epistemology, the study of knowledge, of *how* we come to know about the nature of reality. To engage with ontology as a preliminary step is to emphasise that reality and knowledge of reality are different things, that language and interpretation refer not only to other language and interpretations, but also to an existential reality.⁴ The features of that reality that we identify then help us to understand how different interpretations, or discourses, come to be.⁵ In the legal context, therefore, a focus on ontology can help us to

⁴ Isaaksen 2015.

⁵ The debate between critical realism and post-structuralism is beyond the scope of this thesis

understand how the nature of the social reality external to the legal system influences the form and substance of legal discourse, and how, in turn, legal rules and concepts are formulated and applied to that external reality.

The need to place social ontology at the forefront of social analysis is one of the central tenets of critical realism.⁶ Critical realism is a philosophy of science that is based around several ontological and epistemological premises. One key premise is that human knowledge captures only a fragment of the full depth and complexity of social reality. Reality is stratified, or layered, and so cannot be equated with the empirical domain of observable phenomena, nor the beliefs and ideas we form of them.⁷ It cannot be exclusively or mainly studied, therefore, in closed experimental environments that posit linear causal relationships between different entities and events.⁸ To truly understand the nature of the world requires a deeper engagement with the underlying causal mechanisms and processes that explain the emergence of such phenomena, examining these mechanisms as they operate in the real world. This means taking seriously the idea that they will interact with each other in often contingent and unpredictable ways.⁹

A second important premise of critical realism is that social forms cannot be reduced to the motives, actions and beliefs of individual agents, on the one hand, nor be explained entirely in terms of ‘social forces’ on the other.¹⁰ Instead, while social forms such as law arise from human practices and interactions, and so depend upon human beings to exist, they also frame and shape how individuals perceive the world and so are themselves causally relevant to how society evolves. Different aspects of the social structure, including the legal system, interact with each other and human agency in a dynamic and cyclical or recursive way, and so in this sense co-evolve.¹¹

⁶ Bhaskar 2014; Lawson 1997, xii-xiii.

⁷ Bhaskar 2013.

⁸ See particularly: Fleetwood 1999.

⁹ Roberts 2014, 3.

¹⁰ Archer 1995, chapter 2; T. Lawson 1997, 161.

¹¹ T. Lawson 1997, 70, 160-161; T. Lawson 2003, 27-30.

These observations lead to a third premise, namely, that social structures, and the conceptual frameworks through which they are experienced, should be studied as emergent phenomena that are constituted by the relationship between individual, or lower level components; components to which they cannot be reduced.¹² To study law or the legal system is thus to study something that exists independently (in a causal and taxonomical sense) from the agents, texts and practices that give rise to it, but which nonetheless continue to shape and be shaped by its path of development.

A critical realist perspective also suggests that a study of legal discourse, or legal concepts, can tell us much about the social ontology of law, and the nature of social reality more generally.¹³ Critical realists emphasise the importance of conceptualisation as a tool in the social scientist's toolbox, that is, the process by which we abstract the intrinsic features of a phenomena and think conceptually about the underlying mechanisms that account for its existence.¹⁴ But conceptualisation, part of the process by which we take information from our environment and code it in a way that makes sense to us, is an integral part of the process by which new social forms emerge. That is, conceptualising something in a particular way shapes how individuals interact with it, and this makes it possible to harness the existing properties of an entity to perform new functions.¹⁵

If we apply these insights to law, we might say that the process by which the legal system formulates and applies concepts to describe, or conceptualise a particular practice, or entity, itself plays an important constitutive role in society at large, shaping the way that a given practice or entity is perceived. By describing a particular arrangement as a 'contract', for example, another party's promise becomes something that gives rise to certain substantive rights and obligations that parties can rely on in making decisions. Similarly, if the legal system describes a relationship as one of 'employment', this influences the parties' perceptions of their rights and obligations, and thus how contractual bargaining, and the relationship it-

¹² Discussed extensively in: Archer 1995; Bhaskar 2014 particularly 106-8; T. Lawson 2012; T. Lawson 2015. On competing conceptions of emergence, see: Elder-Vass 2005.

¹³ Deakin 2015.

¹⁴ Danermark, Ekstrom, and Jakobsen 2001, 27–30.

¹⁵ This idea broadly corresponds with Lawson's concept of 'positioning.' It should not be confused with John Searle's conception of speech act. For a discussion see: T. Lawson 2015; T. Lawson 2016.

self, plays out in practice. Through legal discourse, therefore, existing entities and practices can be given new functions, shaping how individuals interact with them and, in the final event, how society evolves.¹⁶

By describing aspects of capitalist social relations in a particular way, the legal system plays an important role in constituting capitalist society in a *cognitive sense*. Through juridical language, the law conceptualises an external social reality in a way which is compatible with its own internal conceptual framework. It thus takes an implicit position on the nature of social reality, and law's own role in relation to external social and economic relations. Thus, whether the law sees its concepts as describing or reflecting a certain social reality, or, alternatively, as constituting or shaping social relations in light of the broader values and ideals they express, affects the way in which concepts are used in legal reasoning.

The social ontological perspective suggests that legal concepts cannot be studied in isolation from the social practices from which they emerged. Nor, however, can they be studied in isolation from the broader conceptual framework, internal to legal reasoning, of which they form a part.¹⁷ Individual concepts have meaning for the legal system only within the wider network or framework of linked ideas and categories through which new concepts are formulated and existing concepts reproduced and refined. They are only meaningful, therefore, because of their relationship with the legal system's *past* practices and communications, which are, at any given time, embodied in this wider framework of categories. To take the practical example which this thesis will explore in more detail, the legal concept or category of the 'wage', while to some degree reflecting *existing* practices, is also influenced by meanings attributed by the legal system to these social existents *in the past*, and which are bound up in the concepts which are at the law's disposal at that particular point. In this sense, concepts constrain the evolution of the law as much as they facilitate it.¹⁸ The process of conceptualisation is itself shaped by the legal system's existing conceptual structure, leading to path-dependencies

¹⁶ For an application of these premises to the legal concept of the corporation, see: Deakin 2017.

¹⁷ Danermark, Ekstrom, and Jakobsen 2001, 28.

¹⁸ Deakin 2015, 181.

that ‘lock-in’ assumptions and beliefs that correspond with conditions that may no longer hold, but which continue to influence the path of the law.¹⁹

It might be argued, therefore, that the legal system can be seen as a form of cognition, that is, a cognitive system where meaning is produced and reproduced, as part of a dynamic co-evolutionary process with its environment.²⁰ In the same way that human cognition is limited by the conceptual frameworks and structures through which the world is accessed, the legal system’s cognitive processes are constrained by the pre-existing structure of its analytical or conceptual architecture. Legal concepts that arise in one context can thereby exercise an important influence over the law, shaping how new facts are processed and conceptualised by the system. As Luhmann observed:

‘Concepts compound information... [they] are genuinely historical artefacts, auxiliary tools for the retrieving of *past* experiences in dealing with legal cases.’²¹

By taking a detailed look at their evolutionary path, therefore, it is possible to reveal the historical contingency of certain legal forms, the ‘efficiency’ or importance of which may otherwise go unquestioned, leading to path dependencies which close off investigations of alternatives that may be better suited to today’s environment.²²

¹⁹ Deakin 2002, 40.

²⁰ Luhmann 2004.

²¹ Luhmann 2004, 340.

²² Arthur 1989; Broekman 1986; Deakin 2002, 22; North 1990; Roe 1996.

2.1 Why Engage with Social Ontology?

The critical realist approach explains reality in a common-sense way. There is nothing particularly radical about the idea that human knowledge is fallible, that the world is open and complex, and that our ability to understand the world is limited by our pre-conceptions and existing conceptual frames. Rather, the originality of its approach lies in the fact that it asks these ontological questions in the first place. The purpose of a social ontological approach is not to adopt a radical conception of society that is inconsistent with our experiences, but to emphasise the importance of thinking conceptually about our assumptions about the world, and the causal mechanisms and processes that might account for these every day experiences, exposing those assumptions to challenge. This prevents our implicit assumptions from distorting how social problems, and potential responses to them, are conceived.

The Taylor Review (2017) into modern working practices is a prime example of how implicit ontological assumptions can limit the scope for a meaningful engagement with social problems and constrain the legal system's capacity to address them. The purpose of the review was to provide a set of supposedly pragmatic policy proposals to promote fair and decent work, focussing particularly on the problems of unclear employment status and insecure pay. These proposals have been heavily criticised, however, for failing to produce meaningful recommendations.²³ The often-overlooked reason for this failure is an ontological one with which even these critics fail to engage.

The ontology implicit in the review, as in much doctrinal and empirical labour law research generally, is that the legal system and the market are independent, pre-constituted realities where there is a linear, and direct, relationship between specific legal rules and socio-economic outcomes. The review argues, for example, not that law must address or prevent the 'increasing casualization of the labour market' but that it must *reflect* it, and

²³ McGaughey 2017; Moyer-Lee 2017.

*‘adapt to reflect current business models.’*²⁴ For the purposes of addressing low pay, this means that there is little the law can do if the outcome the market dictates is that employers offer piece-rate payments to a surplus of casual workers rather than stable employment at a guaranteed weekly income, absorbing the risks of low demand. If, therefore ‘...an individual knowingly chooses to work through a platform at times of low demand, then he or she should take some responsibility for this decision’ which means ‘accept [ing] payment on a piece-work basis’ if this is the outcome that the market requires.²⁵

On one level, these perspectives appear as basic common sense, but at another level they make ontological claims which may be disputed. This is particularly so when it comes to the implicit assumption which Taylor makes about the nature and function of legal concepts. The review treats legal concepts as empty shells, abstract and unnecessarily complex linguistic formulae that legal scholars ascribe to social phenomenon but which it is for policy-makers to fill with legal content.²⁶ For this reason, the review suggests that to address the prevailing confusion over employment status what is needed is a greater use of legislative definitions, leaving less room for judicial interpretation. This is to be complemented by new labels for the different employment statuses, renaming the ‘worker’ as a ‘dependent contractor’ to better clarify the distinction between (now) workers and employees.²⁷

One of the problems with this perspective is that it overlooks the role that history plays when it comes to shaping the way in which legal concepts are interpreted and implied *and* the role that legal concepts play within the structure of the legal system as a whole. The origins of the legal concept of the ‘worker,’ for example, can be traced to the period prior to the emergence of the contract of employment. The common-law tests that evolved in conjunction with the worker concept continue to play an important role in the broader structure of employment law as whole.²⁸ Dispensing with such a concept is to dispense with many potentially important and relevant aspects of legal doctrine, the consequences of which cannot be fully foreseen.

²⁴ Taylor 2017, 31,40,59.

²⁵ Taylor 2017, 38.

²⁶ Taylor 2017, 35–36.

²⁷ Taylor 2017, 35–36.

²⁸ Discussed in detail in Chapter seven.

This perspective highlights why the choice of concept used in legal drafting can shape the way in which a particular policy is interpreted and applied in practice. It can thus affect how well such a policy achieves its intended effects. This can be illustrated by a number of examples arising from situations where a choice has to be made between the various concepts through which the worker's right to be paid is expressed: wages, salaries, and remuneration.

The Workmen's Compensation legislation of the 1890s was designed to provide reparation in the event of industrial injury, to compensate the worker for the loss of future income. Rather than tying compensation to *wages*, Parliament used the term *earnings*, a distinction that the courts drew upon in a number of cases to increase the scope of the statute's protection. They began by rejecting the idea that earnings ought be equated with 'wages' as used in the Truck legislation where it referred to the 'price of personal labour.' This was because the Truck Act 'was passed for a different purpose, and [thus] it uses expressions different from those found in the statute we have now to construe.' Instead, it was argued, 'the word "earnings" is used, not in the sense in which economical writers use it, but in a popular sense...the full sum for which the man is *engaged* to work.'²⁹ This, it seemed, corresponded to the total remuneration payable to him in connection with employment. In contrast to the term 'wages' therefore, 'earnings', (or 'remuneration') in the context of the Act was said to include sums that might be deducted by way of charge for machinery, lighting and other equipment necessary for the job,³⁰ expenses paid for accommodation when work was done away from home,³¹ and tips or gratuities earned from third parties during the course of employment.³² This was because 'you must look at what was the actual amount of the man's *remuneration* for his services' and this meant that the employer could not deduct 'the expenses he had to incur for the purpose of putting himself into a condition to earn that remuneration'³³ nor the costs involved in guaranteeing that he 'comes to [his work] properly equipped according to the general understanding and practice in that particular trade.'³⁴

²⁹ *Abraham Coal Company* [1903] AC 306, 307-8.

³⁰ *Abraham Coal*.

³¹ *Midland Railway Company v Sharpe* [1904] AC 349.

³² *Great Western Railway v. Helps* [1918] AC 145. See also: *Penn v Spiers & Pond, Ltd* [1908] 1 KB 766 (CA).

³³ *Midland Railway*, 352.

³⁴ *Abraham Coal*, 308-9.

The distinction between ‘wages’ and ‘remuneration’ also proved significant in the context of the Catering Wages Act 1943.³⁵ In the debates surrounding the Act, the government emphasised that the term ‘wages’ was to be used rather than ‘remuneration’, even though ‘remuneration’ had become the term commonly used in legislation concerned with minimum rates of pay. The significance of this choice was expressly noted by the courts, which suggested that even the occasional reference to remuneration ought not cloud the fact that ‘it is wages with which this act is concerned.’ The reason this mattered was that while the Wages Councils legislation had used the term ‘remuneration’ because its primary aim had been to provide a guaranteed minimum weekly income from employment, the issue in catering was the tendency for employers to shift the costs of labour onto the consumer. By employing the term ‘wage’ instead of ‘remuneration’, Parliament had sought to exclude from the calculation of the minimum rate any sums received by way of tips. This was only possible through the ‘wage’ because of its (then) connotation as a payment to which the worker was absolutely entitled to be paid by his employer in exchange for his labour. By definition, therefore, it excluded tips and gratuities paid by third parties which formed part of his contractual remuneration.

Parliament has not always been so thorough when it comes to the choice of concept deployed. The result has often been to create unintended effects that later need to be corrected - something which might itself be difficult to achieve. This was the case with the Truck Act 1831. Here Parliament had sought to prohibit employers from imposing charges on their workers for their use of machinery, but did so through a prohibition on deductions from wages. This proved ineffective because charges fell outside the scope of the common-law conception of the wage as the market price for labour.³⁶ In light of this, Parliament initially responded by modifying the statutory definition of the wage, but when this proved inadequate it was forced to intervene by enacting separate provisions to prohibit such charges, and to prohibit fines, that were to work independently from the general prohibition on deductions from wages. From its original enactment, therefore, the intended result took over sixty years to achieve.³⁷

³⁵ This is discussed in detail in Chapter five.

³⁶ *Archer v James*, 121 ER 998. For more detail, see Chapter three.

³⁷ Departmental Committee on the Truck Acts 1908 (evidence of Mr Cunnyngame) 2, Qq 14-5.

It is not just Parliament, however, that might overlook the significance of different statutory concepts. It is often the case, for example, that the courts will interpret a concept in light of modern conditions, failing to engage with the significance of the context in which it was initially deployed. This is clear from the way in which the Apportionment Act 1870 has been interpreted and applied. The purpose of the Act was to render apportionable periodical payments such as rents and annuities so that they could be apportioned between successors in title.³⁸ The Act included within the definition of annuities ‘salaries and any other periodical payment’ in order to include within its scope public-office holders paid for tenure of an office. This definition was designed to deal with the problem that, where an office-holder died mid-way through a payment period, the deceased’s estate would be unable to claim an apportioned part of the salary for the period during which the deceased had occupied the office.³⁹ This point notwithstanding, the courts drew on the concept of the salary to extend the Act to private-sector employees with a view to better protecting their accrued salary in the event of wrongful dismissal. The rationale for doing so was that the situation was structurally similar to that facing office-holders on termination of their post. Recently, however, the courts have lost sight of the particular context to which the Act was applied - termination of the contract - and the purpose for which it had been initially extended. The result has been to undermine the protection that the Act had once provided by extending it to circumstances when the contract is continuing. The effect has been to bring the salary within the scope of the employer’s right to make deductions from ‘wages,’ by making it take effect as a divisible payment for divisible obligations to work.⁴⁰

3. Method and Outline

Having introduced the critical realist approach and having shown the importance of engaging with the problem of low pay and unclear employment status through the frame of social ontology, we are now in a position to explore the methodological implications of this move in more detail. This means taking seriously Tony Lawson’s suggestion that questions of social ontology, the nature of social reality generally and the social reality

³⁸ Matthews 1982.

³⁹ Matthews 1982.

⁴⁰ See Chapter five.

of law in particular, need to be expressly addressed before substantive research is commenced, helping us to tailor our methods to our object of study.⁴¹

In light of this observation, we might distinguish two levels of social ontological analysis of the type attempted here. First, we need to engage in what Lawson refers to as philosophical social ontology. This involves exploring the nature of our object of interest, how to distinguish what law actually *is*, so that we can trace its, or an aspect of its, evolution over time. This means engaging with the nature of social reality generally, and how structures such as the legal system emerge and evolve. This is a useful preliminary step to prepare the ground for the next step, scientific social ontology, which involves extending these insights to study at a more concrete level the nature and properties of a particular social existent.⁴² This type of analysis is historical, evolutionary, and conceptual, and is referred to here as ‘genealogy’. This involves tracing the evolution of a particular legal concept through legal discourse over time, drawing on statute, case law, Hansard and select committee reports for this purpose. In this thesis, it will be applied to trace the evolution of the concept of the ‘wage’.

3.1 Philosophical Social Ontology: A Theory of the Legal Form

Philosophical social ontology involves isolating a particular aspect of social reality, such as law, and exploring at a relatively abstract level its distinctive properties and functions, the deeper causal mechanisms that explain its emergence, and elaborating its underlying conditions of possibility.⁴³ Because the social practices from which social forms arise are inherently bound up with the nature of the dominant mode of production, however, this type of analysis will only be fruitful if we expressly engage with the relationship between law and the capitalist system.

⁴¹ T. Lawson 1997; T. Lawson 2003; T. Lawson 2014, 43.

⁴² T. Lawson 2014

⁴³ T. Lawson 2014, 10.

Capitalism is characterised by the generalised wage-dependence that is brought about by the systematic exclusion of workers from the means of production, leaving them with no choice but to provide their labour to others in order to subsist. It also presupposes features such as commodity production, the orientation of production around exchange, capital accumulation, and wage-labour.⁴⁴ Each of these elements presupposes the existence of a market, one in which labour power can be sold in return for wages, and in which the products of that labour can be sold for a profit. It follows from this that while capitalism can only function against a background of inequality, wage-dependence, and a reserve army of labour, if capitalism is to be sustainable there also needs to be a ready supply of labour, a stable demand for products, and a population of individuals that are seen, and see themselves, as capable of participating as equals in the market.

On the basis of the premises advanced thus far, the market should be conceived as an emergent phenomenon that arises from the repeated actions of individual agents. Market practices, such as exchange, pricing, and bargaining, along with the economic categories of commodity, value, and price, emerge endogenously as these actions stabilise and become more routinised, as ‘separate casual acts of exchange [are] transformed into expanded, systematic commodity circulation.’⁴⁵

Like institutions such as trust and reciprocity, law and the legal system are emergent phenomena that arise from the same practices and conditions that gave rise to markets. It is for this reason that there is a close relationship between the economic concepts of commodity, value and price and the fundamental legal categories of the subject, the contract and property (the ‘legal form’):

‘just as the regular repetition of the act of exchange constitutes value as a universal category beyond subjective appraisal and arbitrary exchange ratios, so too the regular repetition of the same relations - custom - lends new significance to the sphere of sub-

⁴⁴ Dobb 1946, 7.

⁴⁵ Pashukanis 1987.

jective dominance by providing a basis for its existence in the form of an external norm.⁴⁶

These observations, of the pre-eminent Marxist legal theorist Evgeny Pashukanis, are similar to more recent insights from evolutionary game theory, to the effect that collective practices within particular communities can give rise to shared understandings that generate norms of behaviour.⁴⁷ In local markets, therefore, trust and reciprocity often emerge endogenously from interaction between individual agents, and thereby provide a basis for co-ordinating behaviour. In this way, market activity could be sustained on the basis of custom and tradition, without the need for any formal system of law. Nonetheless, as Pashukanis emphasises, ‘tradition, or custom is by nature something confined to a particular, fairly narrow geographical area.’⁴⁸ To be effective at co-ordinating behaviour, norms and practices must mean the same thing to different people within a particular domain. For this reason, custom and tradition can provide a basis for co-ordination only among a relatively homogenous group where it is possible to observe ‘how things are done,’ and where social or moral sanctions provide an adequate incentive to conform.⁴⁹

Formal legal mechanisms are, in one sense, a further adaptive response to the co-ordination problems that are initially solved by local custom and practice as society transitions from small-scale exchange to widespread impersonal transactions based on universal exchange. Publicly enunciated laws are accessible to a wide range of persons, are general and universal, and as such are presumed to apply indiscriminately irrespective of the status of the parties. Thus, while markets existed in the feudal era, based primarily on custom, they lacked the universal categories of price and value as social referents arising independently from the subjective valuations of individual actors.⁵⁰ In the same vein, they lacked any notion of a universally applicable status and norm, for ‘only the development of the market (system) creates the

⁴⁶ Pashukanis 1987, 119.

⁴⁷ Aoki 2010; Young 1996.

⁴⁸ Pashukanis 1987, 119, 124.

⁴⁹ Chen and Deakin 2015; Deakin et al. 2015.

⁵⁰ Pashukanis 1987, 119.

possibility of and the necessity for transforming the person appropriating things by his labour into a legal owner.’⁵¹

Law is not only an adaptive solution to co-ordination problems, however, for law also *shapes* those practices and has historically played an important role in bringing about the conditions for commodity exchange to become more generalised and widespread. Generalised exchange presupposes the disintegration, or dismantling, of the feudal structure, which, by tying workers to the land, placed substantive limits on what, and how much, could be sold on the market.⁵² This process, achieved via a system of land enclosure, both presupposes and creates the wage-dependence that ‘frees’ workers from that land and which indirectly compels them to work in order to have access to commodities for subsistence. These changes are connected, moreover, to the emergence of a system of private property rights and a centralised state with the capacity to enforce them.⁵³ Law not only provides the material conditions that give rise to, and reproduce, the social practice of exchange, therefore, but also plays an important role in producing the cognitive framework that helps co-ordinate market activity so that these practices can be sustained. It follows that a social ontology of law needs to place at the centre of analysis the cognitive dimension to law’s constitutive role: a social ontology of law must be able to explain the processes by which the legal system discursively reflects and/or shapes capitalist society and how this influences the way society evolves.

Taking a critical realist perspective highlights, therefore, that law is as much a constituent element in the market as the market is in the law itself. It confirms Pashukanis’ insight that the ‘the dialectical development of [legal] concepts parallels the dialectic of the historical process itself,’⁵⁴ that the ‘development of the fundamental juridical concepts’ (such as legal subject, contract and property) not only provides us with an abstract image of the inner workings and structure of the legal system ‘... but also reflects the actual process of ...the development of...society itself.’⁵⁵ This approach has something in common not just with evolutionary game theory, as we have just seen, but with social systems theory. Niklas Luhmann’s

⁵¹ Pashukanis 1987, 124.

⁵² Braverman 1998.

⁵³ Chen and Deakin 2015; Deakin et al. 2015.

⁵⁴ Pashukanis 1987.

⁵⁵ Pashukanis 1987.

observation that rather than the law responding directly to the demands of the economy, the law and the market are ‘structurally coupled’ in the sense that they presuppose and rely upon each other ‘structurally as features of [their] environment’⁵⁶ making possible a degree of co-evolution between them, notwithstanding their causal autonomy, is directly relevant here. Like all systems, entities and structures that are constitutive of capitalist society, the law, and the market ‘exert an indirect influence on each other,’⁵⁷ precluding any explanation of the relationship between law and outcomes such as low pay in terms of direct or linear causation.

3.2 Scientific Social Ontology: A Genealogy of the Wage

The purpose of philosophical ontology is to clear the ground so that substantive theorising can proceed more fruitfully.⁵⁸ Having explored at a conceptual level the nature of social reality generally, and the nature of law in particular, Chapter one will leave us in a better position to develop a methodological framework for the substantive investigation in the rest of the thesis.

The type of enquiry undertaken in chapters three to seven is a form of scientific social ontology which, in the context of this thesis, takes the form of a genealogical analysis that traces the evolution of a particular legal concept over time. The purpose of scientific social ontology is to extend our understanding of the nature of social reality to the study of a particular social existent, reconstructing its evolutionary path by tracing its causal history through its conceptual manifestations. To do this requires selecting an appropriate concept, one that might be capable of shedding light on the research question. Here, therefore, the concept chosen must express the essence of wage-labour, as the subject matter of labour law, have a direct bearing on questions of low pay, inequality, and status, and on the tension identified above between the substantive inequality and wage-dependence, and the formal equality and subsistence, that capitalism presupposes. The concept chosen is the concept of the wage, a choice that follows from the way in which

⁵⁶ Luhmann 2004, 383.

⁵⁷ Teubner 1993, 61.

⁵⁸ T. Lawson 2014, 5.

this concept has been conceptualised in legal and economic theory and the important questions these approaches have raised.

3.2.1 The Concept of the ‘Wage’

In economics, the term ‘wage’ has a generic meaning that refers to the sum paid by an employer to a worker in exchange for labour. In law, as will be shown below, the term is more precise. The economic concept of the ‘wage’ finds its legal expression through a number of different juridical concepts such as the ‘wage’, the ‘salary’, and ‘remuneration’, all of which require investigation if the causal history of the wage in its broadest sense, encompassing both economics and law, is to be fully explored.

In neoclassical economics ‘wages are the price of labour; and thus, in the absence of control, they are determined, like all prices, by supply and demand.’⁵⁹ This means that the wage’s principal function is to facilitate co-ordination, that is, to help employers and workers adjust their behaviour in a way that maximises their joint utility.

The basic premise underpinning this conception of the wage is that in conditions of free competition, wages for workers of comparable productivity will be more or less equal throughout the market. This guarantees that the wage is set entirely by the impersonal forces of supply and demand; no one can directly influence the wage-rate.⁶⁰ Employers will decide whether or not to hire an extra worker by comparing the potential value of the worker’s labour with the costs involved in the wage, and workers will determine whether it is worth providing an extra hour of labour by weighing up the potential gain from the wage against the opportunity costs of lost leisure time.⁶¹ In this way, the wage facilitates co-ordination in the market.

In neoclassical economic theory, efficiency requires that prices reflect the social costs of production. It is this that ensures that supply and demand remain in equilibrium.⁶² It is implicit in

⁵⁹ Hicks 1963, 1.

⁶⁰ Hicks 1963.

⁶¹ Addison and Siebert 1994.

⁶² Coase 1992.

the neoclassical theory of wages, therefore, that the market wage fully compensates workers for the ‘productive factor’ that they supply: that the market or equilibrium wage is not, by definition, exploitative because in conditions of free competition, it will accurately express the full costs of production.⁶³

Neoclassical economics implicitly excludes from consideration, however, the institutions and material processes by which labour is reproduced over time.⁶⁴ The supply of labour is determined entirely by a price-quantity relationship that is analysed exclusively within the framework of the market.⁶⁵ It thereby neglects the processes by which commodities, including labour power, are formed. This is not the case, however, for classical and institutional economics. The classical economists, including Marx who, in this respect at least, was particularly influenced by Ricardo, recognised that the wage is a central factor in production, circulation, and distribution and in the reproduction of labour. As a result, they saw the cost of social reproduction as an exogenous (pre-market) factor that determined the wage rate.⁶⁶ There was a distinction, therefore, between the wage as a price determined by supply and demand, and the wage as the ‘natural price’ or cost of social reproduction:

‘The natural price of labour is that price which is necessary to enable the labourers, one with another, to subsist and to perpetuate their race, without either increase of diminution...The market price for labour is the price, which is really paid for it, from the natural operation of the proportion of supply to the demand; labour is dear when it is scarce, and cheap when it is plenty. However much the market price of labour may deviate from its natural price it has, like commodities, a tendency to conform to it ...It is not to be understood that the natural price of labour, even estimated in food and necessities, is absolutely fixed and constant. It varies at different times in the same

⁶³ Kaufman 2013, 8-9.

⁶⁴ Picchio 1992, 4.

⁶⁵ Picchio 1992, 4.

⁶⁶ Marx 1867, chapter 7; Picchio 1992. Social reproduction in the broad sense refers to the total costs of reproducing a population of workers over time. It thus includes costs of education, health, retirement etc. Here, however, the Webbs use the term more to refer to the *social cost* of labour that portion of the costs of social reproduction that go into reproducing the labour expended in the production process. Space precludes a more in-depth discussion of the notion of social reproduction and its relationship with ‘social costs.’

country, and very materially differs in different countries. It essentially depends on the habits and customs of the people.’⁶⁷

The classical economists therefore saw the natural or ‘social’ wage as something that was socially, historically, and politically conditioned. It was not, in other words, determined entirely by its relationship with demand. It was this recognition that enabled them to engage explicitly with the tension at the heart of the capitalist system, namely the limit that the process of capital accumulation poses on the market’s capacity to maintain an alignment between the ‘social’ and the ‘market’ wage.⁶⁸ This perspective raises the question of whether the wage’s market coordination function might be in tension with its social reproduction function. If so, this gives rise to a further question: if the two are to be reconciled, which institutions, and specifically which of the concepts through which the law tries to express the idea of the wage, are best suited to this end?

These questions became central to the institutional critique of the neoclassical theory of wages that developed in the 19th century where the distinction between the ‘social wage’ and the ‘market wage’ came to be placed at the centre of the analysis.⁶⁹ Particularly well-known proponents of this view include Sidney and Beatrice Webb, ardent supporters of the statutory minimum wage. The Webbs criticised neoclassical economics on the basis that it ignored the institutional forces that lent structure to the labour market.⁷⁰ The existence of such forces is such, they argued, that the agreed wage will rarely reflect the full social cost of labour, notwithstanding that its capacity to do so is a precondition for the efficient and effective functioning of the price system. The market presupposes some form of ‘labour law,’ in other words, some mechanism to provide the conditions for the payment by employers of a ‘social wage.’

⁶⁷ Ricardo 1821, 93,99. See also: Malthus and Pullen 1989, 240; Smith 2015, 85.

⁶⁸ Picchio 1992.

⁶⁹ For recent contributions see: Hodgson 1988; Samuels 1992.

⁷⁰ Webb and Webb 1897, 2:671.

‘The continued efficiency of a nation’s industry obviously depends on the continuance of its citizens in health and strength. For an industry to be economically self-supporting, it must, therefore, maintain its full establishment of workers, unimpaired in numbers and vigour, with a sufficient number of children to fill all vacancies caused by death or superannuation. If the employers hire them [workers] for wages actually insufficient to provide enough food, clothing and shelter.... or if they can subject them to conditions so dangerous or insanitary as positively shorten their lives, that trade is clearly obtaining a supply of labour-force which it does not pay for.... [This is] a vicious form of parasitism.’⁷¹

Like the classical economists, the Webbs emphasised that the wage performs not just an allocative or co-ordination function, but a vital social, or reproduction, function as well.⁷² The argument was not simply that to be fair the wage should be one that is capable of providing workers with a fair standard of living. Instead, the ‘social reproduction’ or ‘social’ wage (referred to by them as a ‘living wage’) was an analytical concept, expressing the idea that the economy cannot flourish without an adequate supply of workers, which can only be guaranteed if wages allow for the reproduction of the working class.⁷³ To exclude from empirical models of the labour market the spheres of reproduction and production, was thus to obscure, and fail to engage with, the tensions at the heart of the capitalist system and to underplay the constitutive role of labour law.

The Webbs’ campaign for a ‘social wage’ throughout the 19th century formed part of their much broader critique of the neoclassical model of the market.⁷⁴ The Webbs sought to emphasise the historical, social and legal influences structuring the labour market. The essence of the argument was that, while it may be that on the surface the impersonal forces of demand and supply appear to determine the wage structure, in practice, Adam Smith’s so-called ‘invisible hand’ is actually the hand of government.⁷⁵ By specifying actors’ endowments, and

⁷¹ Webb and Webb 1897, 2:751.

⁷² Webb and Webb 1897, 2:750–51; Webb 1912.

⁷³ Picchio 1992.

⁷⁴ Webb 1912.

⁷⁵ Picchio 1992, 135.

determining the rules of the game, legal and social institutions directly influence labour market outcomes by structuring the bargaining conditions of the parties *ex ante*.⁷⁶ It is the man-made institutions of private property, rules of competition and the contract of employment that make it possible for the logic of self-interest to appear as if it mechanistically determines the ‘true’ or ‘equilibrium’ value embodied in the wage. The choice between a system in which firms pay workers poverty wages for inhuman hours, or living wages for an 8-hour working day and universal health insurance, is, they suggested, a political, or institutional one, rather than one that would have to be played out according to any so-called law of nature. Labour law is not a restriction on a freely competitive market, in other words, but is integral to the effective and efficient functioning of the capitalist socio-economic system.

The Webbs never seriously engaged, however, with whether there may be limits inherent in the legal form itself when it comes to guaranteeing that the functions of both the market and subsistence wage are performed. Despite their critique of the neoclassical model, they too treated law as if it was simply the product of intentional human design. For this reason, the main constraints on labour law’s development were seen to be political, stemming from government and employer resistance to legal intervention in the market. The analysis in this thesis will suggest, however, that this issue is actually more complex. As we shall see, there are inherent constraints embedded within the legal form that shape labour law’s path of development, and thus limit its capacity to secure a social wage.

This distinction, between the wage as price and the wage as the cost of subsistence, is not unknown to legal discourse, as the analysis in chapters three to seven will confirm. Legal discourse frequently engages with the idea that the wage performs two vital, albeit contradictory, functions. One of the clearest attempts to distinguish between market and social wages can be found in the Australian *Harvester* judgment. Here, the Court carefully distinguished between wages as determined by private bargaining, and the ‘fair and reasonable remuneration’ that Parliament might require employers to pay as a condition for their right to employ them:

⁷⁶ Kaufman 2013; Webb and Webb 1902.

‘The provision for fair and reasonable remuneration is obviously designed for the benefit for the employees in the industry; and it must be meant to secure to them something which they cannot get by the ordinary system of individual bargaining with employers. If Parliament meant that the conditions shall be such as they can get by individual bargaining - if it meant that those conditions are to be fair and reasonable, which employees will accept and employers will give in contracts of service, there would have been no need for this provision. The remuneration could safely have been left to the usual, but unequal contest, the “higgling of the market” for labour, with the pressure for bread on one side, and the pressure for profit on the other. The standard of ‘fair and reasonable’ must, therefore be something else; and I cannot think of any other standard appropriate than the normal needs of the average employee, regarded as a human being living in a civilised community.’⁷⁷

The judge argued that if labour is to be treated as a factor of production it follows that employers ought to pay both their fixed and variable costs, including the cost of maintaining their ‘capital’ value over time. This is exactly what the employer would expect as regards the fixed and variable costs of other factors of production, such as land, animals, or machinery:

‘If A lets B have the use of horses, on the terms that he give them fair and reasonable treatment, I have no doubt that it is B’s duty to give them proper food and water, and such shelter and rest as they need; and, as wages are the means of obtaining commodities, surely the State, in stipulating for fair and reasonable remuneration for the employees, means that the wages shall be sufficient to provide these things, and clothing and a condition of frugal comfort estimated by current standards.’⁷⁸

These same ideas began to emerge in English law in the early-mid 20th century, around the same time that the contract of employment was beginning to be extended to manual wage-

⁷⁷ *Ex parte HV McKay (Harvester Case)* (1907) 2 CAR 1, 3.

⁷⁸ *Harvester Case*, 4.

workers.⁷⁹ In 1930, for example, James Maxton MP, drawing on the Australian approach to the living wage, introduced a Private Members' Bill called the 'Living Wage Bill', the object of which was to 'secure that the payment to every employed person of at least a minimum wage sufficient to meet the normal needs of the average worker regarded as a human being living in a civilised community, including the satisfaction of reasonable minimum requirements of health and efficiency and of cultural life and the provision of reasonable rest and recreation is a charge on industry.'⁸⁰ Maxton emphasised that this Bill was not to replace, but was to operate alongside, the Trade Board Acts that were concerned with regulating the rate at which wages were paid for work done in specific trades.⁸¹ The idea of the living wage was thus associated with a different function than legislation regulating the rate at which labour was sold for wages in the market.

During the early-mid 20th century English law began to much more systematically distinguish between these ideas of the wage, and did so through the distinction between the concept of the 'wage', the price of labour, and 'remuneration' - the total sum due to the worker in connection with his employment:

'The meaning of the word wages is a direct payment related directly to work done...Remuneration is not mere payment for work done, but is what the doer expects to get as the result of what he does in so far as what he expects to get is quantified in terms of money...it may be that it goes even wider than that.'⁸²

In *Smart v Spencer* (1948), explored in more detail in chapter four, the court drew a distinction between 'two quite different matters in which legislation might impose terms as between employer and employed: the first is the provision of a minimum wage for *work done*...[the second] is whether a man should receive wages in respect of a period when he does no work and is not required by his employer to work....If the legislature were minded to interfere in

⁷⁹ Deakin and Wilkinson 2005.

⁸⁰ 20th Century House of Commons Sessional Papers, vol 2, 197 (preamble).

⁸¹ HC Deb 06 February 1931 vol 247 cc2269-354, 2276-7. See also at 2285 per Captain Hudson.

⁸² *S & U Stores v Lee* [1969] 1 WLR 626, (Blain J), 629.

this area in a minimum-wage act, one would expect the language to make it clear that this separate subject matter was also being dealt with.’⁸³ This ‘separate subject matter’ translates into a right to be paid for time in contractual employment, one that is not conditional, nor proportionate to, time working. This type of legislation covers rights such as the right to sick pay, holiday pay and/or the contractual right to be paid for ongoing service under a contract of employment.

That the concept of the ‘wage’ performs a function quite different from that of ‘remuneration’ is immediately apparent from Lord Blanesburgh’s dissenting judgment in *France v James Coombes & Sons* (1929). Here, the majority had sought to circumscribe the minimum wage rate to time performing the work that was characteristic of the Trade to which the rate applied. Lord Blanesburgh’s discomfort with this stemmed from his belief that the Trade Board Act 1918 (in contrast with its predecessor, the Trade Board Act 1909) was designed to do more than guarantee a minimum price was paid for labour rendered, concerned instead with the worker’s right to earn a reasonable remuneration from employment:

‘These Acts do not require that ...the employer...find work for his workers in general... what is required of the employer is that the worker shall receive at least the minimum rate of remuneration for the work actually done, *or for the time spent in the statutory employment...* [nonetheless] this immunity of the employer carries with it a collateral right in the worker. During the periods when the employer is not bound either to employ or pay him he must be left at liberty either to obtain his minimum wage from another employer, or to exercise his skill for his own benefit. In no other way can the minimum or subsistence wage which for workers of his trade the Acts essay to provide be found for him. Accordingly, where an employer, as the respondents here did, binds a worker, in this instance, the appellant, to be in continuous attendance at his premises ready, if called upon, to undertake his boot repairing as and when required, and where by the same agreement the worker is required to do no boot repairing for anyone else...such an agreement...would be void under the Acts, *unless for*

⁸³ [1948] 2 KB 105, 112.

*the whole time of his service there was payable to the worker a wage at the minimum time-rate.*⁸⁴

Parliament seized on the distinction between ‘wages’, as the price of labour, and ‘remuneration’, as a cost that an employer *ought* to bear as a condition for purchasing it when it came to the drafting of the Wages Councils Act (1945):

‘The reference to remuneration is wider than that to rates of wages because it has a different legal meaning and gives wider powers to the board’... ‘Wages Councils will be given a general power to fix remuneration, and remuneration includes the fixing of a guaranteed weekly wage...[e.g.] if a man works only four days instead of 6 [he will still be paid the same weekly sum]’.⁸⁵

The significance of this was also acknowledged in the House of Lords in terms similar to the arguments of the Webbs:

‘Ensuring that every low paid wage-earner will receive either a legal or moral guarantee of a reasonable weekly wage... [the Act] takes a step further towards the implicit obligation of the modern state to provide a minimum standard of welfare for all its citizens by means of social services or statutory regulation of terms and conditions of work.’⁸⁶

The alignment between the legal concepts of ‘wages’ and ‘remuneration’, on the one hand, and the economic ideas of the ‘market’ and ‘social’ wage on the other, is not perfect, however, for the legal concepts themselves say little about the amount that has to be paid. In the

⁸⁴ [1929] A.C. 496, 506-7.

⁸⁵ HC Deb 16 Jan 1945 vol 407 cc66-116, 77 and 75 respectively, per Mr Bevin.

⁸⁶ HL Deb 13 Feb 1945 vol 134 cc981-5, per the Earl of Listowel.

above cases, therefore, much turned on how the minimum rate was set and how it was calculated at a given time. Nonetheless, the broader significance of these concepts and the distinction between them would seem to lie not in their capacity to provide workers with a specified amount of income, but in the function that they perform within legal discourse more generally. The ‘wage’ appears to perform a function analogous to the concept of the market wage in that it reflects the contractually agreed sum that an employer pays for abstract labour time. ‘Remuneration’, by contrast, seems to perform a function akin to the idea of the social wage, an obligation to pay workers that is decoupled from working time and so reflects more than simply the value of a commodity. In this sense, it could be said to build on the much older concept of the ‘salary’ as a fixed and unconditional payment, not for work, but for contractual service over time, but going beyond it in that it includes any additional contractual entitlements and the various employment rights which are today implied into the contract of employment.⁸⁷ In this way, therefore, it would operate to shift on to the employer some of the social costs that the concept of the wage, as something that expresses the value of commodified labour, is unable to reflect.

It seems from this that the concept of ‘remuneration’ operates to ensure that the socio-economic functions of both the ‘market’ and the ‘social’ wage are performed: that is, the wage as a price that co-ordinates decision-making in the market, and the wage as the cost of social reproduction. The concept says nothing of how much an employer must pay for labour, which itself helps to uphold the image of the wage as something that is set by the ‘impersonal’ forces of supply and demand. Nonetheless, it imposes on the employer an absolute obligation to pay that sum, and requires that, in addition, the employer bear the social costs implicit in the institution of employment. This it does first by decoupling the obligation to pay from the provision of labour, such that it becomes a payment for personal service over time, and second, by implying into that concept the obligation to pay not only the contractually agreed rate, but also the costs of certain protective labour rights which help to bridge the gap between that rate and the costs of subsistence.

⁸⁷ On the distinction between ‘basic wage’ and remuneration, see: *Weevsday Ltd v Kings* [1977] ICR 244 (EAT).

If the above is correct, and the concept of ‘remuneration’ ensures that the functions of the social and the market wage are reconciled, we need now to build on this insight to explore why, the existence of this concept notwithstanding, labour law continues to struggle to provide for wage security today. To answer this question requires a much more detailed understanding of the processes and conditions that gave rise to the concept of the wage, and the associated concepts of remuneration and salary, the assumptions embedded in them, and their relationship with the broader social and economic changes taking place. This means engaging at a deeper level with the form and function of legal concepts generally and the legal system’s view of its own role when it comes to how far such concepts are intended to reflect, or shape, social relations.

Chapter one below will suggest that the appropriate methodology for exploring these questions is a genealogical one, tracing the evolution of the concept of the wage over time. Genealogical analysis of this type requires a close textual or discourse analysis, tracing the evolution of the concept of the wage over time, analysing case law, statutes, select committee reports and Hansard; and engaging with historical materials so as to shed light on the broader context in which the concept is conceived and applied.⁸⁸ In this way, we can reveal the pathways, and unravel the definitions, embedded in these concepts and open them up for challenge.⁸⁹ The benefit of exploring these questions through the frame of social ontology, employing a genealogical analysis to trace the evolution of concepts such as the ‘wage,’ is not only that it helps to clarify the meaning and function of these concepts, clearing out misunderstandings that might be inhibiting their effectiveness; but also that it helps to shed additional light on the social ontology of legal concepts, how they relate to capitalist social relations, and the scope and limit of their capacity to constitute, in a cognitive sense, capitalist social relations.

4. Outline and Contribution

⁸⁸ Deakin and Wilkinson 2005, 3.

⁸⁹ Labour law scholars employing this approach include: Deakin 2001; Fraser 1973; Fudge 2007; Fudge 2018. For examples outside this field, see: Mussell 2016; T. Lawson 2016.

By studying labour law in this way, and addressing from a new angle aspects of labour law doctrine that have been incompletely studied before now, this thesis makes a number of original contributions to the field.

The thesis contributes to the labour law field by providing a new perspective on the function of the concept of the wage. In particular, it is the first piece of work to draw a distinction between the concepts of the ‘wage’, the ‘salary’ and ‘remuneration’ and to explore the implications of this for how labour law is applied in practice. It contributes to recent scholarship on the meaning of the concepts of work and wages,⁹⁰ and recent discussions of the problem of low pay in the context of the Taylor review.⁹¹ In so doing, it also makes an important contribution to the economic theory of the labour market by bringing a legal perspective to bear on the distinction drawn in economics between the concepts of the market and social (or ‘living’) wage, showing how these ideas map onto different juridical concepts.⁹²

Engaging with these questions, the thesis also contributes to the literature on the minimum wage.⁹³ It provides a new perspective on 19th century minimum wage legislation, including the Trade Boards Acts and the Wages Councils Acts, thereby building on insights from the work of Sheila Blackburn and Jenny Morris, who discuss the origins of the Trade Board Legislation,⁹⁴ and Otto Kahn-Freund and F.W. Bayliss who examine the structure and origins of the Wages Councils statutes.⁹⁵ In so doing, it highlights the distinctiveness of the Wages Councils as regulatory bodies and the link between them, a particular view of labour law’s function, and the concept of ‘remuneration’. It also brings a new perspective to the National Minimum Wage Act 1998, thereby building on work by Bob Simpson, Guy Davidov and Einat Albin by linking the Act’s conceptual structure to a particular view of the relationship between labour law and the market.⁹⁶

⁹⁰ Davies 2017; Freedland 1977; Freedland 1999; Freedland and Deakin 2016; Napier 1984.

⁹¹ McGaughey 2017.

⁹² Discussing these ideas, see particularly: Picchio 1992.

⁹³ There is a large amount of empirical research in this area, but little discussing the origins and development of the national minimum wage legislation in Britain. See, however: Blackburn 1988; Deakin and Wilkinson 1992; Deakin and Green 2009; Metcalf 1999; Simpson 1999a; Simpson 2004.

⁹⁴ Blackburn 1988; Blackburn 2000; Blackburn 2002; Blackburn 2007; Blackburn 2009; Morris 1986.

⁹⁵ Bayliss 1962; O. Kahn-Freund 1945; Otto Kahn-Freund 1949.

⁹⁶ Albin 2011; Albin 2013; Davidov 2009; Simpson 2004; Simpson 1999b.

The thesis also builds on existing studies of the contract of employment.⁹⁷ In this respect, it makes an original suggestion to the effect that medieval ideas of tenure and leasehold can make an important contribution to our understanding of the form and function of the contract of employment today. In the process, it sheds new light on the nature and function of the concept of ‘mutuality of obligation,’ providing a new perspective on how it might be deployed today in a way that is sensitive to labour law’s broader function. The thesis draws on this analysis to explain the origin of the confusion that exists in relation to the distinction between ‘workers’ and ‘employees’, and the relevance to each of the various aspects of the modern ‘test’ of ‘mutuality of obligation.’ In this way, it helps to clarify some of the confusion underpinning the Taylor Review, building at the same time on the work of Judy Fudge, Mark Freedland and Nicola Kontouris and, more recently, Jeremias Prassl concerning the ‘crisis’ in labour law’s personal scope.⁹⁸

The thesis’ contributions are not limited to labour law, however, for it makes a number of novel contributions to legal theory in general. In particular, it introduces a new way of thinking about the legal form, and the different ways in which the legal system can be said to constitute social relations. More specifically, it distinguishes the way in which the legal system constitutes capitalism materially, and *cognitively*, opening the door to a new way of thinking about the form and function of legal concepts. Relatedly, it also demonstrates that a genealogical analysis that studies the evolution of legal concepts over time not only sheds light on the social ontology of law, and on the nature of social reality generally, but actually tells us a lot about how the legal system conceives its own role, whether it sees its concepts as reflecting, or shaping, social relations.

In light of this, the thesis seeks to make an important contribution to legal methodology generally, showing that much can be gained from applying a social ontological approach to the study of law. Introducing the critical realist approach to the legal field, it suggests an alternative way of thinking about the relationship between law and practice, making practical sug-

⁹⁷ Deakin 2001; Napier 1976.

⁹⁸ On this ‘crisis’ see: Ewing and Wedderburn 1988; Davidov and Langille 2011; Davidov 2016, 201; Freedland and Kontouris 2011; Fudge 2017; O’Higgins 199. In relation to the worker concept see: Davidov 2005; Prassl 2017. On mutuality of obligation, see particularly: Austin 1969; Collins 2002; Kontouris 2015; McGaughey 2010.

gestions about the implications of this approach for how to improve the quality of legal research. In so doing, the thesis reveals important antecedents to the critical realist approach in existing traditions in legal research. This includes Marxist legal theory, particularly the work of Evgeny Pashukanis, and the social systems theory of Niklas Luhmann - traditions that are often but incorrectly assumed to be diametrically opposed. By revealing the scope for cross-learning between these fields, the thesis opens the door to new techniques and methods to be used to further improve our understanding of law.

By highlighting the importance of a social ontological approach to labour law, moreover, and the contribution that an analysis of legal concepts can make to our understanding of the relationship between legal and social change, the thesis also builds on the work of Brian Napier and Simon Deakin who employed a similar technique in order to study the evolution of the contract of employment.⁹⁹ By expressly situating this analysis in the context of a theory of capitalist social relations, however, the thesis helps meet criticisms of scholars such as Ruth Dukes, that studying concepts such as the contract of employment through the lens of the relationship between labour law and the labour *market*, risks obscuring labour law's broader role in the reproduction of capitalist social relations.¹⁰⁰ In the process, it makes an indirect contribution to a much broader field of study in the philosophy of the social sciences that explores the contribution that the theory and method of social ontology can make to our understanding of the social reality of capitalism generally, and of markets in particular.¹⁰¹ By employing this approach to the study of law, it helps to clarify how law fits within the critical realist conception of society.

5. Clarifying the Scope of the Thesis

⁹⁹ Examples of the 'genealogical' approach include: Deakin 2001; Deakin and Wilkinson 2005; Foster 1979; Fudge 2018; Merritt 1982, 19; Napier 1976; Napier 1986. Despite not using the term ontology directly, the evolutionary language these authors employ can be understood as social ontological in the sense in which the term is used today.

¹⁰⁰ Dukes 2014, 206. Like Dukes' work, the thesis situates an analysis of labour law's form and function specifically in the context of capitalist society. However, while Dukes' focus is on the political struggles through which distinct legal institutions are forged, and thus the relationship between substantive aspects of labour law doctrine and capitalist social relations, the focus of this thesis is more specifically on the form of labour law discourse and its relationship with the structure of capitalist society.

¹⁰¹ C. Lawson et al. 2013; T. Lawson 1997.

Before commencing the substantive analysis, it is necessary to clarify exactly what this thesis is, and is not, attempting to achieve.

It should be clear from the preceding analysis that the method employed involves a textual inquiry into forms of legal discourse. It does not involve an empirical investigation into how the legal system constitutes capitalism materially, that is, through the material effects of legal rules. Instead, it is concerned with the *cognitive* dimension of law's constituting function and this requires a detailed analysis of legal discourse, rather than archival work or statistical analysis. Because the thesis uses primarily doctrinal sources, therefore, it cannot show that law constitutes the market in a material sense. Rather, it can reveal the extent to which the view of law's role that we find implied in legal discourse influences how labour law is applied by judges and other legal actors. By these means the thesis also opens up theoretical perspectives on the importance of labour law in making the market sustainable.

A further point of clarification is that, in this thesis, references to the legal system should not be seen as references to particular institutions or agents. The thesis recognises that the legal system includes the human beings, processes, techniques and texts without which it would not exist, but it takes seriously the idea that law can be conceived as an emergent phenomenon that is more than the sum of its parts. It is in this sense that we can speak about how the legal system itself 'thinks' about, or 'sees' its relationship with capitalist social relations, without engaging in a form of anthropomorphism that ignores the material dimension of the legal system and of law.

In terms of scope, it should be noted that the thesis is not purporting to examine all aspects of the evolution of labour law. Rather, the focus is upon those aspects most directly related to the concept of the wage, and in particular, those relating to the relationship between an individual employer and employee or worker. This means that where collective labour law and the tax and social security systems are discussed no attempt has been made to provide a detailed account of their origin or evolution, nor to examine in depth the fiscalization of the wage throughout the 20th century.¹⁰² Instead, they are analysed only to the extent that this is

¹⁰² On this, see: Harvey 2018.

necessary to shed light on the meaning and function of the concept of the wage. The discussion of tax credits in chapter six does not engage, therefore, with the definition of earnings in social security legislation, although this might be a fruitful path for future research. Instead, it explores the tax credit regime only to the extent required to understand the law relating to the national minimum wage.

Moreover, the genealogical approach does not require a straightforward linear narrative; thus, the thesis does not attempt to reconstruct a narrative history of the legal changes which it analyses. Instead, the approach taken, and the resulting chapter structure, is analytical, in the sense of organising the discussion around a number of distinct but related themes.

Finally, in the argument that follows, much is made of the relevance of the idea of ‘tenure’ to our understanding of modern labour law. It is important to clarify the nature and scope of the argument being made, however, to distinguish it from arguments made elsewhere.

This thesis is not the first attempt to emphasise the important role that property law can play in advancing our understanding of labour law.¹⁰³ There is now considerable literature, for example, concerned with demonstrating how the idea of job ownership can be drawn upon to provide a new perspective on employees’ stakes in the firm. These ideas are now being used to provide explanations of earning differentials between groups of employees, and to suggest an alternative basis for unfair dismissal protection.¹⁰⁴

This thesis shares with this literature scepticism about how far contract law can take us when it comes to understanding the nature of the labour relationship. It differs qualitatively, however, for rather than advancing a new normative rationale for labour law, this thesis is instead suggesting that the historical evidence reveals that property law continues to exercise a lasting influence over the way in which labour law is conceived, and that it is possible to engage with this to clarify some of the tensions that we see in the law concerning the contract of employment.

¹⁰³ See: Mummé 2016a; Novitz 2012; Njoya 2013.

¹⁰⁴ See particularly: Njoya 2013.

This thesis is not, however, reviving the debate over the relative importance of status and contract within the legal account of the employment relationship.¹⁰⁵ These ideas are not irrelevant to the study that follows, but the focus of the analysis is more on the nature of the property *relationship* that the contract establishes between the parties; the idea that because labour is inalienable, the contract provides for proprietary rights that are exercisable over the worker, rather than some abstract notion of his ‘labour.’ It moves from here to explain that this property relationship takes a particular form, and that this resembles the way in which the concept of tenure had been conceived during the feudal period. By drawing analogies with the institution of leasehold, the thesis shows why ideas of tenure remain relevant to our understanding of the structure of the contract of employment, and how the assumptions it reflects can be drawn upon today to clarify some of the tensions in the case law.

Despite drawing upon the idea of the ‘lease of labour’, however, it is important to emphasise that the argument is entirely different from that which underpins the literature on the *locatio conductio* and the civil law concept of the contract of employment. It is often noted that the drafters of the post-revolutionary codes consciously adopted a model of the labour contract that was shed of pre-modern notions of status, and did so by building upon the Roman institution of the lease, or hire, of services. The debate arises, however, from the observation that in fact, as in France, the law continued to support the worker’s subordination, while German law developed a concept of employment that much more closely resembled the communitarian ideas of work that preceded the codification process. In this literature, therefore, the *locatio conductio* is seen as a mere form that helped assimilate pre-modern ideas about status with the revolutionary ideals of freedom and equality that emerged within the developing law of obligations.¹⁰⁶

To understand the distinctiveness of this argument, however, it is necessary to recognise that in Roman law, agreements to do a job for someone, agreements to let land, or to hire chattels, are all species of the wider genus of ‘lease’ or hire. It is a broad category that defines

¹⁰⁵ Graveson 1941; O. Kahn-Freund 1967.

¹⁰⁶ Deakin 2009; Hepple and Veneziani 2009.

any transaction by which someone temporarily assigns a thing to someone else in return for a promise to pay. This includes the *locatio conductio operis*, the contract for a particular job or task, and the *locatio conductio operarum*, or hire of services. Like leases of realty, however, these were pure contracts, and gave rise to no proprietary interest in the thing hired.¹⁰⁷ This did not create any property relationship, however, nor give rise to anything approximating the English concept of tenure that is deeply ingrained in English property law.

In English law, to the extent that we find ideas of leasehold within labour law discourse, these ideas are inherited from the feudal institution of villeinage and the tenurial system of land-holding. They thus pre-date the emergence of the modern labour market and its associated ideas of commodification. Rather than acting as a mask for the worker's subordination, therefore, the legal form of the lease actually expressed the essence of that subordination *and* the mutual obligations of maintenance and protection that this implied. The significance of English land law, therefore, is that it presupposes the possibility of concurrent rights in the thing hired, establishing a role for the law to balance the conflict between them. In the labour context, this is reflected in the idea that the labour agreement provides employers with property in a valuable social resource in which workers and the community retain an interest. For this reason, his use of that labour has long been conditional upon certain obligations of fair-use and protection. The result has been to embed in labour law the idea that an employer is expected to pay not merely a 'wage' for labour, but to provide a right to *subsistence* in exchange for his ongoing service. This idea is developed throughout the thesis to show how the relationship between these ideas and the concepts of the market and subsistence wage as conceived in economic theory, and the distinction between the legal concepts of the wage, the salary and remuneration.

¹⁰⁷ Buckland and McNair 1965, 296–9. See also: Lewis 2015.

‘People easily understand that “primitives” cement their social order by believing in ghosts and spirits, and gathering each full moon to dance together around the campfire. What we fail to appreciate is that our modern institutions function on exactly the same basis.’

— Yuval Noah Harari, *Sapiens: A Brief History of Humankind*

CHAPTER ONE

Law and Social Ontology

1. Introduction

Critical realist scholars, such as Roy Bhaskar and Tony Lawson, have had relatively little to say about law. Moreover, legal scholars have not yet addressed critical realist social ontology in a systematic way because it is relatively new.¹ The question of the relationship between legal concepts and economic relations under capitalism (or a market economy) has, however, been comprehensively addressed by a number of legal scholars in a way that, for the purposes of this thesis, can be thought of as ontological. This includes contributions to the theory of labour law (Alain Supiot) and of the welfare state (Francois Ewald), and to the theory of law's coevolution with the economy (Niklas Luhmann), as well as the earlier theorisation of law and the economy by Evgeny Pashukanis. The works of these scholars are of central importance to this thesis, therefore, and will be drawn on here, alongside the insights from critical realism presented in the Introduction, to present an original account of law from a social ontological perspective.

¹ The relationship between critical realism and the positivist tradition of Kelsen and Hart is beyond the scope of the thesis, as is, more specifically, the relationship between the theory of social ontology developed by Lawson and the legal-positivist theoretical literature on the ontology of law which is associated with, among others, the work of MacCormick.

1.2 Legal Form

1.2.1 Alain Supiot and François Ewald: Law's Cognitive Function

Law is a particularly salient focal point when it comes to co-ordinating behaviour. This is because it is a safe default when it comes to predicting how others will act.² But how and why law appears as such a salient focal point is relatively under-explored. In their separate legal analyses, Alain Supiot and François Ewald offer a theory of law's ontology that can help shed light on this question, exploring in depth law's cognitive role.³

Supiot and Ewald each assume that law cannot be studied in isolation from the institutions through which it takes shape, or the society to which it responds. Law lives through these institutions, and the lives of the people with whom it interacts, and so, while it is partly autonomous from the society it regulates, it is also constitutive of and constituted by that society itself. This leads Supiot to draw an analogy between law and language.⁴ Like language, in order to communicate, law must observe a set of well-recognised rules and procedures so that it can influence behaviour. These rules and procedures and the concepts in which they are embodied are inherently dogmatic and contingent, for they reflect a set of shared assumptions about the nature of the world and the role of individuals within it that have stabilised and become accepted as 'truth' as they have been reproduced over time. This implies that legal discourse is a product of the society it regulates, and by creating and reproducing a particular discourse of truth that is accepted by society, it can shape, and be shaped by the way in which that society develops.

The law lends structure to social settings, therefore, by providing the basis for shared understandings, so that individuals can act on a set of stable expectations about the likely conse-

² McAdams 2000. On focal points, see: Schelling 1980.

³ While Ewald is best known for his work on the welfare state, his discussions of social law also include a broader theory of law as a 'practice.' His ideas are similar to Supiot's analysis of law as interpretive technique (see below).

⁴ Supiot 2007, 7-8. See also: Goodrich 1990; Goodrich Barshack, and Schutz 2013; Legendre 1993; Legendre 1994; Legendre 2001.

quences of decisions. Like language, it provides a shared frame of reference that helps to facilitate the co-ordination of behaviour. To be effective, it must express reality in such a way that bears some correspondence to every-day practices and understandings, closely emulating past activities and experiences so that they can be taken for granted in a given domain.⁵

Both Ewald and Supiot place emphasis on the distinctive character of *law* as compared to non-legal norms. Law may emerge from custom or convention, behavioural regularities that stabilise over time, but is distinctive because of the institutional framework through which it is given effect. This changes not only the character of the sanctions, but also the nature of the norms themselves. Law differs from custom in that it is general and universal in character, and can be given expression in a form that is clear and coherent and can be meaningfully enforced. It is this that gives it the capacity to act as a general, or default guide for behaviour. In contrast to custom, therefore, law is subject to the legal system's process of selection, so that what becomes law largely depends upon whether a given rule can fit within the existing structures of the system, can be adapted to its internal processes, and be given meaningful expression through its pre-existing concepts. This is an integral part of how it engenders widespread acceptance. Law is not just a set of isolated rules and regulations, therefore, but an ongoing discourse where legal concepts in their relationship with each other reflect, and are partly constitutive of, the values and experiences of a given society.

These observations lead Supiot and Ewald to the conclusion that law should be seen as an interpretative technique, the discursive process through which society thinks about itself and the individual's place within it.⁶ It reflects in an institutionalised form, the basic 'rules of the game' to which society submits at a given time; the 'dogmatic truths' the acceptance of which helps make social interaction possible.⁷ For Ewald, it is thus 'a particular way of thinking about the relationship of the whole to its parts' ... 'the way in which the social contract is conceived'.⁸ Law thus assumes a picture of 'the world not as it is, but as society thinks it

⁵ Aoki 2010, 128; D. Lewis 2008; Supiot 2015, 18.

⁶ Ewald 1986, 32; Ewald 1988, 37.

⁷ Pierre Legendre uses the analogy of the 'mirror' to explain the instituting function of the law: Legendre 2001, 1; Goodrich, Barshack, and Schutz 2013, 148. See also: Ewald 1986, 38; Supiot 1994, 268; Supiot 2015, 18, 32 and 159.

⁸ Ewald 1986, 40-41.

should be.⁹ Its evolutionary and dynamic character is such, however, that it provides a mechanism not for entrenching or asserting a set of dogmas, but for constantly reconstructing and improving them over time, interacting with society in a dynamic way.¹⁰ Legal discourse thus exists in an ongoing process of emergence, developing and refining the 'map of reality' which it presents so that it can provide a common guide for social interaction and a reference point to facilitate the co-ordination of behaviour.¹¹

From this perspective, law is reflexive and self-referential, partially autonomous from the society it regulates.¹² It is this autonomy that gives it the capacity to act as a common focal or reference point that can be drawn upon as a guide for behaviour.¹³ Its objective and impartial appearance is particularly important, therefore, for it is this that encourages individuals to draw upon it by lending it legitimacy.¹⁴ It is only because law represents the world in an abstract form that corresponds with a set of shared ideals that it can do this;¹⁵ inducing individuals to refer to it so as to give it the capacity to influence behaviour.¹⁶ Law cannot be reduced to a set of rules imposed by some regulatory authority, therefore, for its normativity presupposes its capacity to represent the world in a form which makes sense to individuals, a discourse of truth to which all can be expected to adhere.¹⁷ In order to do this it must be capable of reflecting a vision of the world to which all can be expected to commit, and it is this that expresses the basic idea of legitimacy that lies at the core of the abstract idea of law.¹⁸

It can be concluded from this that law performs not just a regulatory, but a cognitive function; it is only by creating a shared cognitive framework through which individuals think about

⁹ Supiot 2015, 18.

¹⁰ Goodrich 2009.

¹¹ Supiot 2015, 17.

¹² Collins 2002, chapter 3.

¹³ This point is emphasised particularly by Ewald 1987.

¹⁴ Legendre makes a similar argument, suggesting that the 'dogmatic function' or the 'aesthetic dimension' of the normative order gives the institutional order its universality: Legendre 1999 extracted in: Goodrich, Barshack, and Schutz 2013, 151.

¹⁵ Supiot 2015, 17.

¹⁶ Supiot 2015, 17.

¹⁷ Supiot 2007, 17.

¹⁸ Legendre argues that there can only be law if individuals are attached and faithful to the representatives of the law, a form of 'subjective attachment'. See: Goodrich 1990, 288; Legendre 2007, 112.

themselves and society, that legal prescriptions can influence, and so regulate and/or shape, social behaviour.¹⁹

1.2.2 Niklas Luhmann: Law as System

The analysis above suggests that law's capacity to orient individuals and to act as an authoritative and meaningful guide for behaviour presupposes its capacity to maintain its autonomy from the society it regulates and a degree of fit with the world to which it refers.²⁰ It is very much like a map, therefore, in that it must be sufficiently abstracted from the world it represents in order to reduce complexity; but must nonetheless maintain some correspondence between its concepts and the material world it helps to navigate.²¹ These twin requirements manifest themselves as a perpetual tension between autonomy and responsiveness, consistency and change, and it is this that Luhmann's system's theory can help us to better understand.

Luhmann's ontological position is, on first glance, incompatible with the critical realist view of social reality. Luhmann expressly doubted the relevance of ontology given the inherently mediated nature of human knowledge. He claimed instead that science should concern itself entirely with epistemological questions. Knowledge is, he suggested, inherently incapable of depicting or representing reality and so must always be thought of as a construction, a self-production.

That Luhmann did not engage with ontological questions does not mean that there is no ontology implicit in his analysis. Luhmann himself observed that:

¹⁹ Supiot expresses a similar idea in his contrast between the axiological and dogmatic dimensions of law: Supiot 2015, 17.

²⁰ Luhmann 1991a; Luhmann 1995; Luhmann 1986; Luhmann 2004.

²¹ On the reduction of complexity, see: Lee 2002; Luhmann 1995, 43. On the analogy between law and a map, see: De Sousa Santos 1987. See also: Pashukanis 1987, 87–8.

'There is an external world which results from the fact that cognition, as a self-operated operation, can be carried out at all...but we have no direct contact with it. Cognition is a self-referential process. Knowledge can know only itself, although it can, as if out of the corner of its eye, determine that this is possible only if there is more than mere cognition.'²²

Elsewhere, he noted:

'The effect of the intervention of systems theory can be described as a de-ontologisation of reality. This does not mean that reality is denied, for then there would be nothing that operated - nothing that observed, and nothing on which one would gain a purchase by means of distinctions. It is only the epistemological relevance of an ontological representation of reality that is being called into question.'²³

This concern with cognition, with reconstructing distinctive systems of meaning that in their relationship with each other are constitutive of society (as it exists for human knowledge), makes Luhmann's work particularly helpful for exploring how the organisation of law's internal elements generate the emergent properties that define law as law. It is clear from Luhmann's work that he sees these systems, law, the economy, politics etc. as emergent systems, for his language presupposes some notion of causation. The process of functional differentiation, for example, is deemed to be brought about by changing social and economic conditions. The self-referential systems that he studies are thus specific to the conditions from which they emerged, from which 'modernity', the functionally differentiated society of today, developed. For this reason, insights from his analysis of the legal system can make a productive contribution to a social ontological theory of the legal form.

Social systems theory extends the concept of system employed in biology to social phenomena such as law. From this perspective, social institutions emerge from social practices, but at

²² Luhmann 1990a, I.

²³ Luhmann 1990a, II.

the same time, they are not entirely reducible to them. Thus, while the legal system could not exist without the participation of human actors, nor the physical texts and structures through which legal discourse is expressed, it nonetheless has a distinctive reality of its own; the study of which can shed an important light on the relationship between legal and social change. For this reason, we can learn a lot by studying the legal system through its internal processes, structures, and concepts, reconstructing an empirical model of how the system understands itself and its relationship with its environment.

From this perspective, the legal system can be understood as a set of linked discursive practices that help to co-ordinate social behaviour. It evolves in a self-referential way, drawing on external information in the process. This is an expression of its autopoiesis, its capacity to reproduce itself from its own elements, drawing information from its environment, coding and storing it, and transmitting it back in a way that shapes human behaviour. Legal change is always mediated, therefore, filtered through the system's internal rules and procedures, and shaped by the pre-existing understandings that are embedded in, and expressed through, its own limited bank of concepts.²⁴ For this reason, legal change will never provide a direct response to social and economic demands, but nor will it be entirely random or un-informed.²⁵ Legal discourse is shaped by a dynamic interaction between information drawn from society, and the internal processes and concepts that lend this information meaning within the system. This, as Luhmann suggests, is how it balances the competing demands for internal consistency and external legitimacy that it requires to remain responsive to change.²⁶

The legal system's need to maintain internal consistency further emphasises the point raised by Supiot that law is not simply an instrument that social actors can deploy to their own ends.²⁷ The legal system does not, in other words, produce rules that directly respond to social demands. Legal responses to social problems can never be perfect;²⁸ the legal system has only its own rules and concepts at its disposal when responding to new cases, reasoning by reference to past decisions and past assumptions, and communicating through its unique dis-

²⁴ Luhmann 1990b, 190. For a good summary of this perspective, see: Teubner 1987a, 69.

²⁵ Teubner 1987a, 61.

²⁶ Luhmann 1990b, 120.

²⁷ Teubner 1987b, 20-21.

²⁸ Teubner 1986; Teubner 1987a, 61.

course.²⁹ This places limits on its ability to predict in advance the likely consequences of the 'solutions' it provides, such that there is always a risk that a legal decision will create unintended consequences for the future. Its capacity to shape social practice is highly dependent upon its capacity to meaningfully communicate with the social actors it seeks to influence, and this constrains the extent to which legal norms can deviate from past legal forms, and how far it can deviate from (its perception of) existing social practice.

The legal system's capacity to communicate with its environment thus depends upon how well it can co-ordinate with the systems with which it interacts, learning how they operate and refining its concepts so as to better adapt itself in the future. Legal concepts are a particularly important tool that the legal system can draw upon for this purpose, for they enable the system to store socially useful information that would otherwise be lost, preserving it for future use by coding it in a form that is meaningful within the system. In this sense, legal concepts collectively express the system's memory, the way in which it has previously coded information entering the system from other social discourses, and the particular legal responses that have been developed, refined and adapted to deal with them over time.³⁰ Legal concepts such as the 'wage', for example, can be drawn upon by the legal system so that it knows that a particular type of transaction has taken place, informing it as to the status of the parties and thus their legal rights and obligations. But the concept of the wage has a social referent, for its conceptual form reflects the way in which information about the payments made in a particular context have come to be conceived in the broader framework in which the concept has been deployed within legal discourse over time.³¹ Its coding in a particular form, as a price to be paid for a particular commodity in a market setting, can thus influence the way in which the payment itself comes to be conceived. Legal concepts are not just a set of instructions, therefore, telling the legal system how to formulate and apply particular legal rules and when. Existing at the interface between fact and norm, simultaneously describing social practice and seeking to influence it, legal concepts form a distinct part of social reality itself and so shape the way in which social practices evolve.³²

²⁹ Luhmann 2004, 217; Nobles and Schiff 2014, 334; Teubner 1987a, 61.

³⁰ Preuss 1986, 165

³¹ Aoki 2010, 14.

³² Deakin et al. 2015, 171.

The longevity of such concepts presupposes that they be expressed at a high level of abstraction, so as to increase the circumstances in which they can be usefully deployed. This is important for helping the system to reduce complexity, contributing to stability and consistency within the system. Nonetheless, this necessarily prevents there being a direct one-to-one correspondence between legal concepts and the social practices from which they developed. The degree of abstraction is limited, however, by the system's need for the concepts to remain meaningful within the system, and this helps it to retain some correlation to every-day understandings. In this way, while the legal system is primarily driven by its own requirements for internal decision-making consistency and efficiency, this itself presupposes its capacity to co-evolve with its environment. For this reason, the relationship between law and practice can be seen to be one of mutual dependence and support.³³ The more the system is called upon to deploy its concepts, therefore, the greater its capacity to refine and adapt them to changing circumstances. This provides scope for variation, and as such for evolution in the meaning of even its more stable concepts, lending them new functions as they are deployed in new contexts over time.

The legal system's capacity to evolve is thus highly dependent upon its having access to its environment. Regular market transactions produce a close relationship between the economic concepts of possession and exchange, and the legal concepts of property and contract, making possible a form of co-evolution, albeit synchronic, between the systems.³⁴ Beyond this, however, litigation rates are particularly significant in determining how well a particular set of rules or concepts can be adapted. Because only a small fraction of the legal conflicts that arise will result in litigation, particularly given unequal access to the law, certain social discourses will necessarily exercise a disproportionate influence over the law's development.³⁵ Legal evolution is informed, therefore, but it is informed by a fragmented and distorted picture of the world that often favours the interpretation and interests of a particular group.³⁶ Law thus not only reflects a delayed and imperfect response to social demands but also con-

³³ Luhmann 2004, 257.

³⁴ Luhmann 1989, 49; Luhmann 1990c, 198; Luhmann 1991b, 1433–34. This is the principle of 'structural coupling'. For a discussion see: Teubner 1987a, 61–3.

³⁵ Deakin 2001, 5.

³⁶ For a similar critique, see: Goodrich 1986, 188.

structs its solutions by reference to an image of the world that will often skew the solutions it formulates, leading to often unintended results.³⁷ The causes of this are, however, intrinsic to the system, and the consistency and internal integrity that provides the system with its capacity to communicate, and uphold its legitimacy.

1.2.3 Evgeny Pashukanis: The Legal Form

The analysis so far suggests that legal concepts are linguistic constructions which reflect, in the distinctive language of legal discourse, features of the underlying social phenomena to which they correspond.³⁸ They are, in part, a product of social behaviour, and depend upon individuals' subjective perceptions of the world around them, but they also exist independently from them, and so can be studied as autonomous social referents in and of themselves.³⁹ Because legal concepts are both a distinct part of social reality and dynamically related to other phenomena in the social domain, studying them can reveal important insights about the nature of social practices, the broader context in which legal rules have been formulated and applied. The above insights from systems theory demonstrate, moreover, that the historical context from which legal concepts emerge can have a long-run impact on the way in which they develop, making it particularly important to study their evolution over time. This leads to a particular view of legal discourse as path-dependent and self-referential, a perspective that finds considerable support elsewhere.⁴⁰ This insight qualifies the view that law provides relatively direct responses to social demands, and provides further support for the idea that law cannot be explained entirely by reference to the intentions and/or needs of individual actors. Law may arise from human practices, in other words, but once established, it is relatively enduring, shaping human behaviour and exercising a powerful influence over how the social world is conceived.

These insights are important for furthering our understanding of law, but our analysis is still incomplete. What is required now is an analysis of the underlying mechanisms and structures

³⁷ Luhmann 1989, 61.

³⁸ Deakin et al. 2015, 14.

³⁹ Deakin et al. 2015, 170-171.

⁴⁰ David, 1994; Hathaway, 2000; Holmes, 1997.

that give rise to the self-referential legal system that is specific to capitalism, to explore, in other words, law's underlying conditions of possibility. These were the questions that the Marxist scholar Pashukanis placed at the centre of his analysis of the legal form.

For Marx, 'real relations', that is, human practices or relations of production, generate phenomenal forms, characteristic of the spheres of circulation and exchange. These phenomenal forms are reflected in the ideological discourses which help to sustain and reproduce practices such as buying and selling, a particularly important discourse being law. The practices that law sustains are, moreover, essential to the social reproduction of society. It follows that beyond the economic categories of value, price and commodity, and the legal categories of subject, property and contract, there exist deep structures, powers, relations, and tendencies that shape, and are constantly being shaped, by the underlying relations of production.⁴¹

Pashukanis built on these premises, arguing that social regulation takes different forms depending upon the nature of the dominant mode of production.⁴² In other words, because social structures arise from, and are reproduced through, human practices, different modes of production will give rise to different social structures, and as such, different types of normative or 'regulatory' system. Law, Pashukanis suggests, should therefore be understood as that form of social regulation that is specific to the socio-historical conditions of capitalism, distinguishing it, for example, from custom and tradition.⁴³

For both Marx and Pashukanis there are two dimensions to a definition of a mode of production: the relationship between the direct producers and the means of production and the processes through which surplus labour is extracted. Feudalism, for example, is characterised by the fact that the producers, the serfs or villeins, were in direct possession of the means of production, and surplus labour was extracted from them via extra-economic means. In practice, Lords would grant plots of land to their serfs in exchange for certain taxes/dues and services. Their relationship would be governed entirely by customary understandings while the performance of service obligations would be secured by the Lords' (or his Court's) direct coer-

⁴¹ Bhaskar 2014, 71–77; Marx 1867, 540–42.

⁴² Pashukanis et al. 1980, 285.

⁴³ Pashukanis 1987, 79, 119.

cion, rather than any third-party determination of rights. In this way, land and labour could be used and distributed through an institutional power structure that was based entirely on property and wealth: there was no need for a strong centralised state administration or universally applicable law.⁴⁴

In capitalism, this form of social regulation is unsustainable. This is because it is incompatible with the form in which surplus value is realised in capitalism: exchange. For this reason, economic coercion replaces extra-economic coercion, the general and universal, the regional and particular, and freedom and inequality customary notions of status. This leads to a qualitative shift in the form of social regulation.⁴⁵

Consistently with the critical realist approach, Pashukanis and Marx locate the origins of law in human practices, practices that are shaped by the social structures that pre-exist capitalism's development. It is through human practices and interactions that certain conceptions of the world, and the role of individuals within it, are formed. Pashukanis argues, therefore, that individuals assume a particular identity when they participate in the market. In order to be capable of engaging in exchange transactions, they must see themselves as commodity-owners capable of freely disposing of their property.⁴⁶ Pashukanis suggests that these beliefs are not imposed, but emerge from the practice of exchange itself, and become stabilised as exchange becomes more widespread and universal.⁴⁷ Nonetheless, repeated exchange is only possible if participants can be confident that their property will be protected, and agreements observed. This requires a formal mechanism for their enforcement. In this sense, it is in the moment of dispute, as the parties assert their rights, that the legal subject truly 'comes into being.'⁴⁸ Thus, while it is through the social practice of exchange that the concept of the legal subject emerges, it is through legal discourse that the dogmas of freedom and equality it expresses are systematically reproduced. This is a dialectical process, for the ability to assert rights presupposes the particular form of legal subjectivity that is inherent in the legal institu-

⁴⁴ Marx 1981, 602; Pashukanis 1987, 110.

⁴⁵ Pashukanis 1987, chapter 3.

⁴⁶ Marx 1976, 178; Pashukanis 1987, particularly 110 -11.

⁴⁷ Pashukanis 1987, 95-6, 121-2.

⁴⁸ Pashukanis 1987, 81, 93.

tions of property and contract.⁴⁹ The set of 'dogmatic' values that the law expresses itself takes a historically specific form, therefore, for they are particular to the way in which individuals come to conceive themselves in a context of universal market-dependence. This embeds in the legal form the ideals of equality and freedom that the exchange relation represents, expressed in the concept of the legal subject, and the rule of law state. There is thus a dialectical, mutually constituting relationship between the material world and its institutional forms.

The formal equality of the legal subject is intrinsic to a society of generalised exchange-relations, for each person must see themselves as equal both in their capacity for ownership and in their freedom to dispose of their property. They must also be equally disabled from exercising coercion, as this is necessary to uphold confidence in exchange, and stability in the market.⁵⁰ This observation leads Pashukanis to conclude that the centralised state and legal structure monopolising force in a public sphere beyond the market, are presupposed by the concept of the legal subject and so are inherent in the legal form.⁵¹

The possibility of enforcement is inherent in the bindingness of agreements, that which lends them contractual form. It is thus through the ideational construct of the state that the coercion this implies is reconciled with the freedom and equality of the subject. The state only ever appears in legal discourse as an independent 'third party,' representing the impersonal interests of the system, sustaining the idea that there is equal protection for the 'natural' property rights that the market presumes to be enjoyed by all. This dogmatic figure, encapsulated in the concept of the rule of law, is reproduced through legal discourse and this is how its legitimacy can be sustained. The state in capitalism is not just the material embodiment of power, the practical mechanism through which order is secured, it also has a semi-autonomous existence as a legal concept that is reproduced through legal discourse over time. It is this concept, this institutional form, as much as the material form of the state, that is integral to law's ca-

⁴⁹ Pashukanis 1987, 99 -101; 114.

⁵⁰ Pashukanis 1987, 115.

⁵¹ Marx and Engels 1977, 327; Pashukanis 1987, chapter 5, particularly 147.

capacity to stabilise property rights and uphold faith in the bindingness of agreements, making the legal concept itself essential when it comes to facilitating co-operation in the market.⁵²

This analysis further reinforces the idea that law performs not just a regulatory, but also a cognitive or constitutive function, in capitalist society. By presenting the world in a form in which individuals can believe, it sustains the operative reality through which capitalism is lived and experienced, providing the basis for the co-ordination of behaviour in a complex socio-economic system. Its cognitive function is presupposed by its regulatory function, moreover, for it is this that makes it possible to influence behaviour. Legal rules must stay true to the cognitive framework which the legal system sustains if it is to be capable of communicating to individuals and influencing their decisions. Legal regulation must take a particular form, therefore, if it is to be received and experienced as law, and as such be capable of realising, or approximating its intended effects.

It can be concluded from Pashukanis' analysis that inherent in the legal form is the presumption of the legal subject's freedom and equality and the independence of the state and legal system before which they assert their rights: equals before the law.⁵³ This presupposes the concept of the rule of law and a divide between the public and the private that legal rules must respect if they are to be perceived as legitimate and coherent.⁵⁴ Each of these ideas are integral to the institutions of property and contract, which are in turn partly constitutive of the market itself.

In this context, property should be seen as the form which factual possession takes when it ceases to be precarious, and contract the form which agreements take when the freedom to bind oneself is given concrete form by the prospect of third-party enforcement.⁵⁵ Each of these concepts or institutions in combination - property, contract, the legal subject, the rule of law and the public/private divide they imply - can thus be said to express the irreducible elements of the legal form. They exist in perpetual tension, however, with the material inequali-

⁵² Pashukanis 1987, 147.

⁵³ Pashukanis 1987, chapter 5.

⁵⁴ See Pashukanis' discussion on this: Pashukanis 1987, 104-6.

⁵⁵ Pashukanis 1987, 41, 115.

ties that lie at the heart of capitalist wage-labour. For this very reason, however, they help to render these contradictions sustainable.

Pashukanis highlights that legal discourse is abstracted from the material conditions from which wage-dependence and the exploitation of labour arises, expressing just one side of the social relations of capitalism.⁵⁶ The institutional expression that the legal system lends to capitalist society is thus constantly in conflict with the conditions in which workers live and work. Law cannot lose sight entirely of these conditions, however, because this would threaten not just its legitimacy, but its capacity to make sense of the world for those to whom it is addressed. Litigation provides an important opportunity, therefore, for reconciling these two worlds; for it is during this moment that they come into conflict. This is particularly so in the field of labour law. In this way, legal cases provide the legal system with an opportunity to prove its responsiveness, providing access to its environment and a chance to re-enforce its legitimacy. Its capacity to do so is limited, however, by the assumptions inherent in the system, embedded in the basic legal concepts through which legal problems are perceived, and responses constructed. This suggests that there is an inherent limit to the extent to which the legal system can recognise, engage with, or address the inequalities inherent in the capitalist system, for such limits are intrinsic to the concepts that are constitutive of the legal form.

1.3 Legal Form and Genealogical Method: A New Synthesis

The theories explored above can now be built upon to shed new light on the relationship between law and capitalism, teasing out the implications of this for how we understand, and approach, ‘law’ as an object of study.

Capitalism can only function against a background of inequality, wage-dependence, and a reserve army of labour. These are some of the pre-conditions for the emergence, and reproduction, of the capitalist system. Nonetheless, for capitalism to be sustainable, there also needs to be a ready supply of labour, a stable demand for products, and a population of individuals who are seen, and see themselves, as capable of participating as equals in the market.

⁵⁶ Pashukanis 1987, 79.

Capitalism presupposes, therefore, the co-existence of substantive inequality and formal equality, of wage-dependence and the receipt of a wage sufficient to secure the social reproduction of labour.

In economic theory, this tension is reflected in two competing views of the function of the wage, the wage as the 'price' of a commodity, co-ordinating decision-making in the market, and the wage as the cost of social reproduction. The question that a social ontological analysis of labour law must address, therefore, is what role the legal system plays in ensuring, or trying to ensure, that both these functions of the wage can be performed.

In this context, it is important to distinguish between law's material influence on capitalist social relations, and its cognitive role. It may be, for example, that law has a material bearing on class relations, inequality, and power etc. by providing the conditions for commodification, but an equally important but less explored question is the nature of law's cognitive role, and thus the form and function of the concepts used in legal discourse.

The analysis in this chapter has helped shed light on these questions by taking seriously questions of ontology, exploring legal discourse with a view to shedding light on its relationship with social reality. Supiot's work indicates, for example, that the law coordinates behaviour not just through the application of material sanctions or penalties, but through the expression of values. This cognitive dimension of law takes a particular form in capitalist societies. The ubiquity of exchange relations in capitalism necessitates the differentiation of the law from the market. As a result of this separation, there is embedded in legal discourse a perpetual tension between the material conditions of existence and their institutional expression. The discursive reproduction of certain dogmas, embedded in the legal system's defining concepts, is thereby essential to the legal system's capacity to communicate and thus to facilitate the co-ordination of behaviour.

In this respect, as Pashukanis argues, the idea of the free and equal legal subject, together with the institutions of property and contract to which it is intrinsic, are central for our understanding of the form and function of law. Property and contract differ from possession and

exchange in that they presuppose a public sphere in which their stability and enforcement can be guaranteed. The public/private divide is thus implicit in the legal idea of contract. The possibility of independent third-party enforcement is essential to market stability and to the trust upon which high-frequency exchange depends. This in turn presupposes the concept of the rule of law state, the idea that coercion can be legitimately exercised over free legal subjects provided it takes the form of an independent and impartial norm, representing the will of the state as the embodiment of the collective interests of the system. It is clear, however, that while each of these concepts presupposes the institutional structure to which it corresponds, the material realities of the latter necessarily deviate from their representation in legal discourse. It is through legal discourse that the realities of state power, for example, are reconciled with the ideal of impartiality and independence. The rule of law is, from this angle, a legal form, expressing at a relatively abstract level the possibility of legal legitimacy, the substantive meaning of which is discursively recreated and refined in legal discourse as the legal system, the state and society itself, evolves.

The analysis also suggests, as Luhmann's work shows, that the differentiation of the legal system and its partial autonomy from the society it regulates place a limit on the degree of 'fit' that can be reached between the substantive rules that are expressed through its defining concepts and the world to which it is addressed. The conflicting requirements of autonomy and consistency on the one hand, and responsiveness on the other, express in systemic terms the tensions that are inherent in the social relations of capitalism. This is because capitalism depends upon the freedom and equality of the exchange relation, on the one hand, and on the institutionally embedded inequalities that make possible wage-dependence and the exercise of economic power in production, on the other. As Ewald's work suggests, the particular conception of the 'social contract' that we find embedded in legal discourse reflects a particular conceptualisation of how some of these tensions are to be reconciled, something which, as Supiot argues, has historically been one of the goals of labour law but one which it generally falls short of achieving, or at least does so only contingently or temporarily.

The implication of this idea going forward is that there are limits on the legal system's capacity to recognize the wage as anything other than the payment that must be made by an em-

ployer as part of an equal and free exchange. Nonetheless, the law must go beyond an understanding of the wage as 'price' and express a version of the 'subsistence' wage if the social reproduction of labour is to be guaranteed. The law's capacity to bridge the gap between the assumptions on which the market operates and the needs of the capitalist system for some mechanism of social reproduction depend, therefore, on the malleability of its concepts. The law must somehow discursively construct the wage-labour relation in a form that makes room for legal 'intervention' in the market, while also expressing it as a 'free bargain' between legal equals. In order to understand how and if it does so, we require a deeper understanding of the form and function of legal concepts, and hence of the processes through which law actively shapes social relations.

The analysis suggests that legal concepts arise from human practices but nonetheless shape how individuals perceive the world and how they interact with it. In this sense, they can be seen as 'real' in the sense of being causally relevant to how things are and how society evolves. In this respect, they are partly *constitutive* of capitalist social relations. Legal concepts play a cognitive role, in other words, constituting capitalism *cognitively* in the sense of influencing how individuals conceive the world thereby shaping their practices.

Law may be discursive, dogmatic, and ideological, therefore, reflecting the world from one particular perspective, but it does not follow from this that law and legal concepts are purely epiphenomenal. Even ideological or discursive/conceptual forms arise from, and are particular to, historically specific social practices and relations. An important insight that Pashukanis brings is that these practices are inherently bound up with the dominant mode of production because this provides the basic structure of social life. Because law, once established, shapes and frames these practices and how they are conceived, there exists a dynamic feedback mechanism between law and society that embeds in legal concepts a refracted image of capitalist social relations. This process also embeds in juridical thought, the legal system's own view of its role in both shaping and responding to social relations. Thus, the study of legal discourse can lead to a deeper understanding of the relationship between law and the capitalist system.

Exploring the social ontology of law in this way makes a practical contribution to our understanding of the problems of low pay and inequality, the questions at the heart of this thesis. It is by engaging with the relationship between law and capitalism that the tension between the ideas of the market wage and the ‘social’ or ‘living’ wage becomes clear. By drawing on social ontology to frame the problems of low pay and employment status, therefore, we implicitly engage with the underlying conditions that give rise to these problems, and which explain labour law’s role in relation to them, shedding new light on the form and function of legal concepts generally and their relationship with capitalist social relations.

One of the central insights that the social ontological analysis brings, is to show how important concepts are, and thus the process of conceptualisation generally, in shaping human practices. As a method of enquiry, conceptual analysis involves abstracting the distinctive features and functions of a phenomenon and explaining by a process of retrodution how they came to be. But conceptualisation is something that we do every-day, for it is the means by which we take information from our environment and code it in a form that makes sense to us. It is in this constructed, or abstract form that social reality is directly experienced. It is through conceptualisation that distinctive systems of meaning evolve, the competing conceptual frameworks through which we perceive the various domains of society, such as the law, the economy, or science. Each of these domains will sustain and reproduce a different conception of the social world because they are rooted in different aspects of human practice and experience. Because this process is bound up with material practices, however, a study of the process of conceptualisation in a given sphere such as law, and thus a study of the evolution of legal concepts, can provide us with a refracted image of the underlying causal processes at work.

Legal discourse can thus be seen as a conceptual framework, a discursive practice, that both reflects and constitutes social relations, describing social relations in a form that makes sense within the system. In doing this, however, it necessarily reflects back its own role in relation to these social relations, that is, the legal ideas and concepts that have historically played a role in shaping the processes by which they came to be. By studying legal discourse, we not only gain an insight into the social ontological status of law, therefore, but also into how this

status is conceived by the legal system itself. Thus, while an individual judge may not address such questions directly, a close analysis of legal language reveals the implicit position on the nature of social reality that is taken whenever a case or statute is interpreted and applied and, by implication, the legal system's relationship with it. A close study of legal discourse can thus tell us much about how the legal system sees its own role, and that of its concepts, and can in this way bring a new perspective to bear on why labour law struggles to provide for wage security and clarity of status today.

If the legal system sees its concepts as simply reflecting social reality, for example, this would necessarily reduce the effectiveness of law in shaping socio-economic outcomes. If, however, the legal system sees its concepts as additionally playing a constitutive role, attributing rights and obligations with a view to shaping social reality, legal concepts will be more effective at achieving the policy-objectives they are intended to express.

It seems from the above that legal concepts do not have a universal or timeless meaning that can be divorced from the broader historical context from which they emerged and in which they are deployed. Single concepts have meaning only within the wider conceptual framework of which they form a part, and thus only as a result of their relationship with previously conceptualised and communicated experience. Legal concepts thereby provide us with a historical record of past interactions as perceived from a particular perspective, codifying socially useful information that has been retained and reproduced, and possibly transformed, over time, reflecting, at the same time, the legal system's 'self-description'. This is because legal concepts are always processed through the pre-existing legal structures through which the world is perceived. They do not, therefore, directly map on to the social phenomena to which they correspond. By exploring legal concepts and their underlying conditions of possibility, explaining the processes by which they came to be, we can thus learn much about the causal history of society, and the legal system, and how they inter-relate, shedding new light on the social ontological nature of existing legal forms.

This type of enquiry is known as a genealogy. As noted in the Introduction, applied to law, it means reconstructing the historical path by which our existing concepts, such as the concept

of the wage, came to be. It can help to clarify the meaning of these concepts, clearing out misunderstandings that have become embedded over time, while at the same time contributing to our understanding of the nature of legal phenomena and the social world more generally. By uncovering lost meanings, moreover, it becomes possible to reconstruct these concepts so that they may be more fruitfully deployed today. For this reason, genealogy is a particularly appropriate technique to invoke when it comes to addressing the central questions at the heart of this thesis – it is both useful in helping to *explain* why labour law struggles to provide for wage security and clarity of status, and for helping us to think *practically* about how these problems might be addressed. It is thus this method that will be adopted in chapters three to seven to explore the form and function of the wage in more detail.

CHAPTER TWO

Analytical Framework

2.1 Introduction

Chapter one explored law and social ontology in general. This has helped to pin-point the methodology to be used in the rest of the thesis; genealogy. This method is deployed in chapters three to seven to explore, more specifically, the concept of the wage. This chapter builds on the analysis in Chapter one to develop a theoretical framework to be used for this purpose, before introducing some of the core concepts encountered in the rest of the thesis.

2.2 Legal Ontologies and the Wage

In Chapter one, it was argued that law constitutes the labour market in both a material and cognitive sense, and that the cognitive dimension of law has a material influence on how society develops, shaping social practices and relations by influencing how they are conceived. Law both upholds and participates in the cognitive framework that arises from, and reproduces labour market practices, and operates through that framework so as to bring about the material conditions that are required to sustain it. The rest of the thesis builds on this insight, taking a closer look at how law constitutes capitalism cognitively through a genealogical study of the legal concept of the wage.

The Introduction suggested that neoclassical economics presents the wage as the outcome of rational bargaining. This makes the law appear as exogenous to a natural, market-led process. The social ontological perspective forces us to move beyond the neoclassical approach, however, by suggesting that law plays a constitutive role. Rather than focusing on the surface appearance of the market, therefore, it shifts our focus onto the deeper mechanisms and processes that give rise to, sustain and reproduce, labour market practices over time. In practi-

cal terms, this includes various legal and non-legal institutions, class relations, occupational structures, health, education and other public services, as well as labour law, tax, social security law, and the private property framework in general. Law's role is particularly important here, not only for bringing about and sustaining the wage-dependence and inequality that indirectly compels workers to work, providing the basis for the free contract, but also, through labour law and the contract of employment, for providing support to the employer's control over labour in production, while at the same time limiting through protective labour legislation how far the employer's exploitation of this commodity can extend. In this sense, law is integral to the emergence of the labour commodity and, as a result, the wage.⁵⁷

The legal system's role is particularly crucial when it comes to securing the economic idea of the wage as something capable of co-ordinating decision-making in the market. As classical and institutional economics recognise, labour markets can only operate, and be sustainable, if the wage takes effect as an obligation to pay the social, and not just the private costs of production: a 'social wage'. The costs of social reproduction must, therefore, be an exogenous factor conditioning the wage rate. The exogeneity of the wage is important for sustaining consumer demand, and for securing a stock of productive labour for present and future use, but these functions could be conceivably performed outside the market. At the same time there remains the co-ordinating function that prices perform in a context of decentralised exchange. It is only because prices co-ordinate decision-making that markets can be seen as efficient mechanisms for allocating resources throughout society. This is only possible, however, to the extent that prices cover the full costs of production. The problem is that, in relation to labour power, which presupposes the reproduction of the worker himself, this cannot be assumed. Indeed, the co-ordinating function of the wage may operate in direct contradiction to its reproduction function. The pure market cannot resolve this problem, any more than models of the market which presuppose perfect competition are capable of adequately representing it. The task of integrating the co-ordination and reproduction functions of the wage is one which ultimately rests with the law.

⁵⁷ For an excellent analysis of the co-constituting role of different aspects of the legal framework, see: Harvey and Geras 2018.

In a capitalist system, workers' wage-dependence is such that they have no choice but to sell, and thus to produce the labour power they sell in the market. This means that when deciding whether to accept the wage, their point of comparison is not the cost of producing that labour, but the difference between the wage offered, and the best wage they might obtain from one of the firms' competitors. Information about the costs of producing labour power never actually becomes embedded in the wage-rate, therefore, for it is never an element in the worker's decision. This generalised wage dependence is presupposed by the emergence of the labour commodity, and it is this that ensures that workers sell not labour, but labour *power*. This has important implications when it comes to the relationship between the social and private costs of labour. The labour power that the wage acquires is equivalent only to the variable costs involved in the day-to-day use of the machine (or other productive resource).⁵⁸ Because workers do not sell themselves, because they effectively *hire* themselves to their employers, like the landlord who leases his land, they remain responsible for the fixed costs of 'maintenance' and 'repair.'⁵⁹

While a failure to pay this 'maintenance' cost is actually harmful for employers, in the absence of a guaranteed increase in productivity, or a guarantee that all other employers will do the same, employers are unlikely to pay such a wage; for an individual employer, to do so risks pricing oneself out of the market.⁶⁰ The labour market creates what would now be called a Prisoner's Dilemma situation, therefore, that cannot be resolved within the market process.⁶¹ Nor, however, can it be resolved by the State through the fiscal system. Systems of wage-subsidisation or supplements designed to top up the wage to subsistence level simply further reduce the employer's incentives to pay fair wages and, by distorting the information embedded in prices, subsidises inefficient firms which might otherwise be forced to improve their production methods to compete. To be viable, and sustainable, therefore, the labour market

⁵⁸ Dobb also emphasises the significance of the fact that labour power is hired, rather than sold: Dobb 1975, 52-3. A similar analogy with the variable costs of machinery is found in: Bonar 1891, 146.

⁵⁹ Marshall recognises this, but draws no normative conclusions from this about the proper wage-rate: Marshall 1895, Book VI, Chapter IV.

⁶⁰ Dobb discusses why employers may be reluctant to pay high wages to provide for long-term health and efficiency of the workforce in some depth: Dobb 1975, 52-3.

⁶¹ Clark 1923.

requires that employers pay a wage that caters for the subsistence needs of the working classes – irrespective of the value to an individual employer of a particular worker's labour.⁶²

The social ontological approach adopted so far has thus been significant for highlighting the important constitutive role that the legal system plays in relation to the wage, suggesting that the market wage actually presupposes a legally constituted 'social wage' that helps embed information about the process of social reproduction within the market process. These observations support the argument in the Introduction that there are two inter-dependent but distinct conceptions, or functions, of the wage embedded in labour law discourse. Henceforth these will be referred to as the 'market' and 'subsistence' wage.⁶³ The first concept refers to the way in which the wage must appear to the parties when participating in the market, the conception of the wage that labour law upholds through the cognitive framework through which labour market transactions take place. The market wage expresses the exchange-value of a commodity, the price that is agreed, or would be agreed (but for market failure), between free and equal legal subjects in a market setting. In neo-classical economics, it is the market-clearing, or equilibrium wage, and is taken by the parties to be an 'objective' representation of a commodity's inherent value, fixed entirely by supply and demand.

The subsistence wage, by contrast, embodies the idea of the wage as something that incorporates the social costs of reproducing labour and society over time. It reflects what the legal system must *actually* require an employer to pay if this cognitive framework is to be sustained: the material conditions that make possible the reproduction of labour over time. The subsistence wage can become the legally constituted wage, therefore, when the legal system requires an employer to pay it as a condition for his access to labour. The subsistence wage is not to be equated with the bare necessities for existence, however, for what is required is a wage that is sufficient both to produce an efficient and productive labour force, and to maintain a customary standard of living so as to sustain the idea that workers are capable of meeting their employers as equals and of acting freely when participating in the market.

⁶² Kaufman 2008; Smith 1776, 67; Webb 1912, 186-7.

⁶³ The term 'subsistence' wage is used here to distinguish this from the concept of the 'social' wage used in economic theory, to emphasise that this is also a *legal* idea that we find expressed through particular legal concepts.

Chapter one has shown, however, that legal concepts such as the wage do not simply describe social phenomena. In the same way that human knowledge of the world is mediated by the linguistic and conceptual frames through which it is accessed, the legal system's own view of the world is shaped by its existing conceptual framework, how it interprets new facts and information in light of previously conceptualised experiences. Legal concepts are both descriptive and normative, therefore, but even their descriptive element cannot be assumed to directly reflect features of underlying phenomena. Legal concepts combine an expression of social relations as conceived through the legal system's own cognitive processes, and its attempt, in light of this, to project certain values or ideals with a view to shaping them. For this reason, while the legal concept of the wage bears some correspondence to the payment that an employer agrees to make in exchange for labour, it cannot be reduced to it.

It follows that how the courts and parliament conceive the relationship between legal concepts and social reality will have important consequences when it comes to labour law's capacity to perform the functions that the concepts of the 'market' and 'subsistence' wage reflect. If the legal system equates the cognitive frame its concepts presuppose with the reality beyond those concepts, it confines itself to passively enforcing rights and obligations that arise from a naturally free agreement concluded in a 'pre-constituted' market setting. It cannot, in other words, go beyond the empirical realm so as to engage with the conditions that give rise to it. If the legal system sees its concepts as part of the process through which the 'reality' of the market emerges, however, this opens the door for a much more active role, with the courts interpreting facts in light of the values embedded in legal concepts, operating through those concepts so as to allocate rights and obligations in a way that will better ensure that both the market and subsistence functions of the wage can be performed.

In light of this insight, it is possible to distinguish two competing models of law's internal ontology. The historical analysis in chapters three to seven will show that each of these conceptions surfaced at different times throughout the period studied.

In the first model, the labour market is seen as an emergent phenomenon that presupposes the legal structures from which it developed. The practices and concepts that are intrinsic to it thus only come into existence in certain socio-historical conditions, if certain institutional preconditions are met. There are no rules or conditions that the legal system must observe, therefore, for the economic 'laws' and 'principles' by which that market operates are themselves a product of the way it is constituted at a given time. There is thus an important difference between the wage that the employer agrees to pay, and the sum he is legally required to pay as a matter of law, for the latter cannot be determined independently from broader considerations about labour law's function, and this turns on what is objectively required, and perceived to be required, to secure social reproduction. From this perspective, therefore, the labour market is embedded in a much broader socio-historical process that secures, however imperfectly, the existence, and reproduction of society.

In the second model, by contrast, labour law is seen to play an exclusively regulatory role, constraining behaviour by altering parties' incentives. Institutions generally are seen as exogenous restraints on individually rational behaviour. Labour law thus appears as a potentially illegitimate restriction on a pre-constituted economic structure, rather than one of many interlocking mechanisms that explain its emergence. Rather than conceiving law's autonomy as an expression of the legal system's causal independence from capitalist social relations, recognising its status as an emergent system, legal autonomy is conceived in terms of the state's independence from the market. This leads to a view of law either as an exogenous restriction on free economic action, or as a direct reflection of the norms that emerge spontaneously from the interactions of utility maximising economic agents.

In this model, rather than imposing an obligation to pay that is informed by labour law's broader function, constituting the parties' agreement in a form that guarantees the payment in practice of a subsistence wage, the courts see the wage and the parties' rights as pre-constituted realities which it is the legal system's role to simply enforce. Law should reflect practice, therefore, and legal regulation *mimic* the norms and solutions produced in the market. The legal system and the market appear, therefore, as alternative forms of social order, with a presumption in favour of the latter due to considerations of economic efficiency.

Law's regulatory role must thus be limited to remedying 'distortions' in an otherwise perfectly competitive system, distortions that originate outside the market process.

From a policy perspective, the former 'constitutive' model recognises a role for law in imposing an obligation to pay wages that is informed by considerations external to the market - the costs of living. It assumes, in other words, that it is important that employers rather than the state bear the social and not just the private costs of labour. In the latter 'reflective' model, by contrast, the limit to what the legal system can require the employer to pay is that which is expressed in the 'objective' market wage - that which the employer agrees to pay, or would have agreed but for market failure. Placing a heavy burden on the tax and social security system to make up the difference between the market wage and subsistence, this model affects not only how well resources are used and allocated in the market and production, but also the fiscal and regulatory burden assumed by the state.

2.3 Clarifying Terms

Having introduced this analytical framework, it is now necessary to explore some of the legal terms of art deployed in the historical analysis, to assist in understanding the materials studied.

The first clarification concerns the legal concept of the contract of employment. This refers to an historically specific juridical form that envisages *ongoing* obligations of future performance between the parties. It is a relational model, therefore, one which rarely applied to wage-workers prior to the 20th century, at which point it was confined to higher-status salaried employees paid a fixed periodical payment in exchange for contractual service over time.

Prior to the 20th century, the contract by which wage-workers were hired seldom provided for ongoing obligations between them and their employers beyond the immediate obligations of work and payment. They were not executory in the sense in which the term is used today, because while each exchange implied obligations to perform work and to employ, these obliga-

tions were deemed to be limited to single units, an hour or day, of labour and payment.⁶⁴ There were no future-oriented obligations that might impose an obligation on the parties to keep the employment relationship in being. Beyond the immediate wage-work exchange, in other words, there was no ongoing obligation on the employer to pay his worker, no ‘mutuality of obligation’ beyond the obligation to pay wages for work. The worker’s implied obligation to faithfully serve was not implied into an ongoing contract, therefore, an implied obligation to continue to offer labour service over time; it arose as an incident of servant status, a by-product of the annual hiring rule, and the penal provisions of the master and servant legislation. In the terms used in Mark Freedland’s work, therefore, there was no relational contract, no arrangement giving rise to a contractually protected interest in ongoing employment and payment.⁶⁵

This distinction, between the wage-work exchange and the ‘executory’ or ‘relational’ contract of employment is important for clarifying the distinction between wages, salary and remuneration, a distinction that is extremely important for understanding the historical analysis. This distinction was introduced in the Introduction (above), but it is worth clarifying the distinction between these terms in more detail.

In its broad, generic sense a ‘wage’ is simply a payment by an employer in exchange for labour service or services. It is in this sense that the term is used in the title to this thesis. The ‘wage’ has a more precise legal meaning, however, that refers to a payment for work done, or labour actually provided. It can be contrasted with the notion of a contract ‘price’, a payment for a contracted for result or task. The wage was distinctive in law for being seen as a form of property right that could not be waived by agreement. It is triggered by the transfer of value, the provision of labour, rather than the ongoing performance of contractual obligations. There is scope for confusion, however, for prior to the emergence of the labour market, the term ‘wage’ was used to refer to payments for faithful service, to dependent servants hired to provide their service exclusively to a single master. Since the 19th century, however, its use has

⁶⁴ Freedland 2005, 90.

⁶⁵ Freedland 2005, 91.

been confined to payments made for commodified labour, whether conceived as concrete labour or abstract labour time.

The ‘salary’ also has a generic meaning, used to refer to any form of payment for labour or services that is calculated on an annual basis. In its more precise legal sense, however, the ‘salary’ refers either to a fixed and unconditional payment paid to an office-holder for tenure of an office, or the periodic payment paid to higher status employees hired under an executory contract in return for contractual service over time. The salary tends to have a protective ambit, in part because its quantum is influenced more by questions of skill and status, than it is any so-called ‘laws’ of supply and demand, while its regular and unconditional nature provides a degree of stability that is not offered by the wage. The evolution of this concept is explored in detail in Chapter four.

The concepts of the wage and the salary can be contrasted to the term ‘remuneration’. Broadly speaking, ‘remuneration’ refers to any form of recompense paid for the provision of some benefit. In its precise legal sense, however, it refers to a contractual payment made to an employee or a worker under an executory contract. It goes beyond the wage or salary, therefore, for it includes a number of non-monetary and monetary benefits that are provided as a supplement. It also includes payments due in connection with that contract, but which might be paid by third parties rather than the employer. It is this concept that tends to be found in protective labour statutes and which, in the case law, is used to calculate the compensation payable following a breach of contract. It is often used synonymously with earnings, therefore, for it reflects the entire benefit to the worker of his employment.

The distinction between ‘wages’, ‘salary’ and ‘remuneration’ highlights a further distinction, between labour; service in the proprietary sense of complete subordination to the employer’s control, and contractual service, or employment, under a contract of employment. The term proprietary is used here to reflect the fact that the employer was deemed to have a protected property interest in his servant’s service, and this was reflected in the nature of the remedies available to him in the event of the worker’s departure.⁶⁶ These different terms along with the

⁶⁶ See Chapter three.

concepts of labour or work, correspond with the different things for which a worker might be entitled to be paid. In the analysis to follow it will be shown that the provision of labour or service in the proprietary sense would, until very recently, trigger an absolute right to wages that could not be varied by agreement. It thus had the status of a property right which trumped any provisions of the contract. The provision of contractual service or ongoing employment, by contrast, corresponds with the purely contractual right to be paid a salary or remuneration, a right that arises from, and so is shaped, by the terms of the relational contract of employment.

The term 'tenure' will also be used frequently throughout this thesis. Tenure refers to a property right, or mode of holding or occupying something of value for a period of time. In feudal law, this was the principal mode or system by which a person held land from a superior, giving rise to certain mutual obligations of service, loyalty and protection. In land law, 'tenure' is the relationship between a tenant and the land of his landlord, in respect of which he pays rent, and owes an obligation to maintain and protect the land for the duration of the lease. The historical analysis will show that this has a parallel in the labour context given that the employer's rights in labour are concurrent with those of the worker and the community. For this reason, they have long been assumed to be conditional upon certain obligations of maintenance and protection. These obligations are, in turn, a condition for the worker's agreement not to interfere with his employer's use of his labour, expressed in the employer's right to his faithful and obedient service.

The analysis will show that during the mid 20th century, the concept of remuneration came to perform a functionally similar role to the medieval idea of tenure. Both these concepts express the premise that the employer's obligation to pay wages goes hand in hand with certain obligations of maintenance and protection. These obligations are implied in, but are nonetheless independent from, the value expressed in the (market) wage and are given effect today through the legal rights that arise from the contract of employment.

There is no *direct* correspondence between the concepts of 'wage', 'salary', 'remuneration' and 'tenure', and the functional categories of the 'market wage' and 'subsistence wage' in-

troduced above. This is because, as noted above, the legal system's view of its own function changes significantly throughout the course of the period studied, and this shapes the way in which each of these terms are conceived. Moreover, absent a comprehensive alphabet of concepts that can be deployed in legal drafting, the context is central when it comes to determining the meaning of the concept in the statute in question. Nonetheless, the historical analysis will show that where the legal system employs the term 'wage', it is very often the market wage that is being referred to, whereas the more that terms like 'salary', 'remuneration' and/or 'tenure' are used, the more ideas about the subsistence wage are implied. If the meaning of any of these terms seems unclear, however, the thesis will specify the sense in which it is being invoked and will indicate how this maps-on to the functional categories introduced above.

Before commencing the analysis, it is important to clarify how the term 'labour law' will be used, for the meaning and scope of the term varies over time. The thesis invokes a broad conception of labour law to encompass the legal rules and institutions that are most directly concerned with the conditions on which employers gain access to labour, and workers the means of subsistence. The thesis takes a relational approach, focussing most specifically on those rules that are directly related to the relationship that arises when labour is exchanged for some form of remuneration.

In the first half of Chapter three labour law encompasses a number of different aspects of the legal framework, elements of medieval land law, the ancient writ actions, as well as specific labour and poor law statutes. Thereafter, it is primarily the developing private law rules of property and contract, and the more specific body of rules concerned with the regulation of the labour market, to which the term labour law refers. Nonetheless, the term will also be used in a more specific sense, particularly in chapters five and six, to refer to the particular labour protections associated with the contract of employment.

Having introduced some of the key concepts to be used in the rest of the analysis and the analytical framework through which that analysis will take place, it is now possible to commence the genealogical enquiry which will proceed as follows:

Chapter three begins the historical analysis by tracing the emergence of the wage from the decline of feudal villeinage, exploring how ideas of feudal tenure influenced the way in which the wage came to be conceived as the labour market developed. It concludes by showing that a ‘new’ idea of the wage as the expression of a price of a commodity had, by the beginning of the 19 century, become integral to the way in which the courts and parliament understood the nature and function of law, and its relationship with the labour market.

Chapter four explores the evolution of this ‘market’ wage by situating it alongside the development of the concepts of the salary and remuneration. By examining the relationship between these terms, and the nature of the distinction between them, this chapter sheds an important light on the structure of early minimum wage legislation and the relationship between these concepts and a particular view of law’s ontology.

Chapter five moves from here to show that since the 1980s there has been a distinctive shift in the way in which that ontology has been conceived. It does by exploring the changes brought about by the Wages Act (1986) with a particular focus on the law concerning deductions from wages.

Chapter six builds on this by exploring the evolution of minimum wage legislation from the 1980s onwards. It begins by providing an historical analysis of the relationship between minimum wages and the tax credit system to better situate the analysis of the National Minimum Wage Act (1998). Exploring the structure of the Act and the conceptual link it establishes between work and wages, this chapter shows why the National Minimum Wage Act and Regulations and the broader tax and social security framework in which they are embedded, are ill-suited to securing workers a subsistence wage today.

Chapter seven builds on insights from earlier chapters to shed light on some of the confusion that exists today in relation to questions of employment status. In particular, it brings an historical perspective to bear on the concept of mutuality of obligation and proposes a potential

reconceptualisation of the employee/worker distinction and the role that mutuality of obligation plays in relation to each.

Chapter eight concludes by drawing together the insights from both the social ontological analysis of law and capitalism, and the subsequent analysis of the history of the wage.

CHAPTER THREE

Labour Law and the Emergence of the Wage

3. Introduction

This Chapter traces the emergence of the wage, starting with the decline of the feudal-system of land-tenure following the Norman Conquest. Section one begins with the period immediately preceding and following the enactment of the Statute of Labourers, examining how feudal ideas about property rights and their link with service obligations shaped how the labour relationship came to be conceived. It shows in particular the lasting influence of ideas about tenure and mutuality on the form and function of labour law, its relationship with the wage, and the role of both property and contract as complementary techniques in the regulation of labour.

Section two moves from here to trace the development of these ideas through the emergence of the poor law and the system of settlement in the 17th century. It shows that the cases decided under the Poor Relief Act 1601, and subsequent statutes in particular, can tell us a lot about the evolving relationship between property and contract, helping us to tease out the law's implicit conception of its relationship with social and economic relations.

Section three then analyses the decline of the system of settlement, the development of the labour market, the disintegration of the institution of service and its link with the emerging concept of the wage as something that was gradually being conceived as the price, or exchange-value, of an alienable commodity.

Section four builds on this by exploring some of the legal and social problems that emerged as the concept of service began to become separated from medieval ideas of tenure and mutuality, leaving workers entirely dependent upon market wages for subsist-

ence. For this purpose, it explores the background and operation of the Truck Acts 1831 to 1887 and their relationship with the internal contracting and sub-contracting systems to shed light on labour law's evolving role in the labour market.

Section five explores this in more depth, analysing the early legal responses to the problem of 'sweated labour' and the emergence of early minimum wage legislation. Tracing the development of minimum wage legislation through the early 20th century, the chapter concludes by showing that, by the 1920s, the conception of labour law's form and function we find implicit in legal discourse was beginning to change, and that this was reflected in a subtle shift in the way in which minimum wage legislation was being conceived. This, it shows, is particularly clear when a comparison is drawn between the Coal Mines (Minimum Wages) Act 1912 and the Trade Boards Act 1909. This suggests that by the beginning of the 20th century, the market and subsistence wage were beginning to differentiate themselves, making room for the emergence of a new contractual conception of the worker's right to be paid, hinged not to the provision of labour, but the idea of ongoing employment.

3.1 Medieval England and the Emergence of Wage-Labour

3.1.1 Legal context

In the years following the Norman Conquest, the title to every piece of land could be expressed in the formula 'A holds land of his feudal Lord B, who holds it of his Feudal Lord C who holds...of the King.' This system, established by the Domesday Book, provided the foundations for the development of the common law, establishing the supremacy of the King and the Courts over his land and subjects.¹

Prior to the 14th century, a central feature of this system was that Lords would grant peasants plots of land in exchange for the labour services required to cultivate the demesne.² The nature of a peasant's right in the land was determined by the nature of the

¹ Plucknett 2001, 13.

² Pollock and Maitland 1898, 146.

service obligations owed as a condition for occupation. If the services were uncertain and ill-defined, the tenant was classed as a villein; if the services were certain and explicit, the tenure was classed as free. This boundary, between unfree and free, dictated the line between manorial custom and law, for the relation between a villein and his Lord was beyond the jurisdiction of the common-law courts. Nonetheless, a Lord's right to the services of his dependants or 'tenants' were derivative of his title to the land.³ If unpaid, these services could be recovered by a proprietary action just as could the land.⁴ For the tenant, what this meant was that payment of rent in personal services was both a condition of land-holding, and, by implication, a condition of subsistence.

The Lord had 'seisin' of his villeins, in that he had possession of them, for the villein was part of the land to which he had title. In turn, he had seisin of the services of his free tenants because he had seisin of the land to which the obligation to serve attached.⁵ In this way, medieval law recognised a unique form of property in persons, one that varied by degree depending upon the degree of indeterminacy of the obligation to serve.⁶ The more uncertain and open-ended the service obligation, therefore, the more closely the Lord's right resembled property rights in the tenant's person.

3.1.2 Socio-Historical Context

Customary rents had been falling throughout the 14th century, making even copy-hold tenure at money-rents decreasingly profitable.⁷ Servile labour was becoming increasingly difficult to secure, and this was only exacerbated by the labour scarcity and rise in wages that was precipitated by the Black Death.⁸ Many Lords had little choice but to let out their demesne, for

³ J. Williams 1879, 12-13.

⁴ Pollock and Maitland 1898, 2:125-8. For a discussion of this and its link with the action under the statute of labourers, see: (1366) YB Mich. 40 Edw 3, fl. 39a-b, pl.16.

⁵ Pollock and Maitland 1898, 1:425; 2:146; Steinfeld 1991, 67.

⁶ The term 'seised' is used here to distinguish the rights being discussed from modern ideas about ownership. Seisin implied possession, as the root of all rights in feudal land law, and was applicable exclusively to real property. This highlights, therefore, that the right in the villein's services was seen as inseparable from the right to the land to which his services, as rent, issued.

⁷ Hilton 2003, 153.

⁸ Hilton 2003, 154.

they lacked access to the labour that was required for its cultivation.⁹ In time, this led many to convert copyhold to leasehold in an attempt to benefit from the more competitive rents, and Lords thus began dispossessing their customary tenants to let out land in larger units.¹⁰ If this was to be profitable, however, the land had to be enclosed. The result of this was to lead gradually to the concentration of land in fewer hands; the need to work for wages was to become more widespread, and more pressing, as the feudal order declined.

By the beginning of the fifteenth century, few feudal Lords were cultivating the demesne directly, for many had exchanged their role as direct producers for that of rentier. This process was assisted by the common law's recognition of the lease as a proprietary interest in land.¹¹ Depopulation and the low productivity of labour had forced many Lords to reduce the size of the demesne, leasing portions to these peasant holders, and others to employ hired labour to cultivate the land directly. Those leasing this land were thus becoming increasingly significant both in the land-market, and as rural employers of labour.¹² The most significant employers at this time thus came from the rising class of peasant-farmers, leasing land from (former) Lords at competitive rents. The result of these changes was that, by the end of the 14th century, the tenurial system was falling into decline, and the lease for years and the service relation were becoming key institutions in the social order that was emerging to replace it.¹³

In combination, service and lease-holding had come to express the differentiation of the landlord and employer functions that had previously been combined in the Feudal Lord.¹⁴ This separation made possible the division of rent from labour, and paved the way for capitalist social relations, and the differentiation between labour and land as fictive commodities.¹⁵

⁹ Tawney 1912, 202-3.

¹⁰ Tawney 1912, 202-3.

¹¹ Plucknett 2001, 373. The legal estate in leaseholds was created by the Statute of Gloucester 6 Edw 1(1278) and 21 Hen. VIII, c. 15 (1529).

¹² Dobb 1946, 65-66.

¹³ We see evidence of this in the commentary in: (1366) YB Mich. 40 Edw.3, fl. 39a-b, pl.16. per Fyncheden JCP.

¹⁴ Noyes 2007, 244.

¹⁵ Polanyi 1944.

In the fourteenth and fifteenth centuries, however, labour scarcity and the persistence of customary rights over land was such that enclosure and investments in technology, rather than the exploitation of wage-labour, offered the greatest opportunities for maximising the yield of the land. This, rather than the institution of service, had been the major source of profit in the emerging agricultural economy, driven by an emerging market in leases more than it was a market in labour. That is not to say that the institution of service was not significant, however, for it helped to lay the foundations for the market in leases to expand. By absorbing the newly property-less and supplying them to those in need of labour, it helped render sustainable the large-scale enclosures of the eighteenth century, and in doing so, helped to pave the way for the emergence of the labour-market.

In the fourteenth century, however, the majority of those in service were only intermittently property-less. Wage-dependence was not a life-long condition, but a transitional phase that provided young adults with the chance to save towards purchasing or renting land of their own.¹⁶ The wage, paid at statutory wage rates, was less significant than the features of the relationship to which it provided access, for it was this that secured workers their subsistence. The composition of the wage-dependent class was only to change from the sixteenth century, as customary land began to be converted to leasehold through large-scale enclosure.¹⁷ During the fourteenth and fifteenth centuries land was still abundant relative to labour so peasants could largely resist the competitive pressures of the emerging lease-market, supporting themselves from a combination of subsistence farming and selling surplus produce.¹⁸ The service relation was not, therefore, a major component of the emerging agricultural economy. It was, however, a functional parallel to the lease as the legal form by which access to scarce social resources was beginning to be secured, in each case modelled as a particular form of property relation characterised by ideas of 'tenure': the right to benefit from a particularly vital social resource being made conditional on certain obligations of fair-use and protection.¹⁹

¹⁶ Kussmaul 1981, 61-2.

¹⁷ Žmolek 2013.

¹⁸ Biernacki 1997, 220; Wood 2002, chapter 5.

¹⁹ The court emphasised that only those without property of their own could be compelled to serve: (1431) YB Mich. 10 Hen. 6, fl. 8b, pl. 30, per Cottesmore J 'the statute is intended only for labourers, who are vagrants and have nothing on which they live, so they will be forced into service, but a chaplain has something on which to live, to common understanding, like a gentleman.' It also emphasised the link between leasing land to villeins,

In this way, the lease and the service relation performed complementary roles in the medieval economy. They each made it possible for the community to benefit from a scarce social resource that was under someone else's control by making access to that resource conditional upon maintaining and preserving it for the long-term benefit of the owner and the community. Tenants were obliged to cultivate and maintain the land as a condition for their right to peaceful enjoyment, while employers were obliged to maintain their servant as a condition for his obedience.²⁰ By these means both the immediate 'owner' and the person most in need of it could benefit from that resource notwithstanding that demand far outstripped supply. Concurrent property rights, which might be referred to as a form of tenure, made it possible to balance the competing interests of members of the community. In relation to service, the employer was made responsible for covering the costs involved in his use of labour, for maintaining it during the hiring, because the exclusive nature of his rights to it prevented both the worker and the community from interfering to preserve that labour themselves. In this way, ideas associated with tenure made it possible for the demand for both land and labour to be met, notwithstanding that no land or labour market had fully emerged that was capable of securing the distribution of each.

3.1.3 The Statute of Labourers and the Common Law

It is clear from the above that the Statute of Labourers 1351 was enacted at a time of profound social change. Leasing of the demesne was becoming increasingly common, and with it, the use of hired rather than servile labour. The position of the villein was considerably improved, therefore, and the commutation of labour rents made it difficult for the courts to deny him a legal right to occupy land.²¹ Copyhold was gradually replacing villein-tenure, there-

and the obligation on the propertyless to serve under the Statute of Labourers: (1366) YB Mich. 40 Edw.3, fl. 39a-b, pl. 16.

²⁰ For the tenant's obligation, see: Wonnacott 2012, 184. Thus, in 1353 the court confirmed that a failure to provide livery constituted a good defense in an action for departure: (1354) Mich. 28 Edw.3, Fl. 21b, Pl.18. In turn, a person without sufficient land of their own were not permitted to retain a servant under the statute: (1364) YB Trin. 38 Edw.3, fl.12b, pl.1; (1366) YB Mich. 40 Edw.3, fl. 39a-b, pl.16.

²¹ See: Vinogradoff 1892, 71.

fore, and this was later to give way to the lease as more Lords struggled to exact profits from customary rents.

The Black Death accelerated these changes, and it was its more immediate effects on wage-rates that provided the immediate impetus for the Statute and the Ordinance that preceded it.²² Labour scarcity had further improved the bargaining position of the villein, and with it, that of the free labourer, leading to a rapid increase in wages. Landowners were struggling to recruit the labour required to collect their harvest, giving many no choice but to excuse their tenants' rental obligations out of fear that they would otherwise quit their holdings in search of paid work.²³ The Black Death had gone a long way towards emancipating the servile population, therefore, making room for hired wage-labour to play an even more significant role in the agricultural economy.²⁴

The Statute of Labourers reflected a fundamental shift in the relationship between the manorial system and the State. Prior to the 14th century, the regulation of agricultural labour had been a matter of status and custom, but provision of a workforce at acceptable wages was now a matter of central governmental concern.²⁵ The Statute made labour compulsory for the able-bodied poor; with villeinage beginning to disintegrate the state now had to enforce a duty to work, with workers who declined to work for a Lord or employer now to be made liable to imprisonment. In an attempt to maintain control over rising wages and prices, the statute had set wages at the rate that had been payable prior to the Black Death, and the payment or receipt of wages in excess of that rate was punishable in the courts.²⁶

The Statute had reserved Lords a first claim to the labour of their serfs, helping them resist tenants' attempts to substitute money-rents for rent-services. Their power over their serfs was further strengthened by the legal remedies available to a Lord seeking to compel the return of a fugitive villein.²⁷ These provisions notwithstanding, the Statute was by no means simply an

²² Ordinance of 1349 (23 Edw. III, c. 1–8); (1351) 25 Edw. 111, Star. 1 c. 1.

²³ Rogers 1884, 207.

²⁴ Rogers 1884, 207.

²⁵ Palmer 2000, 15-16.

²⁶ Putnam 1970; Rogers 1884, 228.

²⁷ Dobb 1946, 55; Putnam 1970, 200-6.

attempt by elites to shore-up a declining feudal order.²⁸ It was a genuine response to the social and economic challenges of the period. It was not just the Lords, therefore, but also the rising class of peasant tenants that gained from its provisions.²⁹ Providing access to labour at reasonable wages, the Statute helped such tenants exploit local markets, accumulate capital and further expand their land-holding and, in this way, paved the way for both the lease and service relation to play a central role in the emerging capitalist system.³⁰

The Statute continued the belief, implicit in the feudal system of tenure, that labour is a resource that belongs to the community, at the heart of which had once been the feudal manor.³¹ The Statute not only protected Lords' claims to their serfs, therefore, but imposed restrictions on freedom of movement to prevent both serfs and workers from leaving the town to look for work. The community's right to control how labour was used was paralleled by similar controls over the use of land, and by the gradual strengthening of the protection provided to both the villein and the lessee. For those with no land of their own, moreover, the Statute guaranteed that the obligation to serve would continue to be conditional upon the worker's access to subsistence, now provided in the form of access not to land, but to a household in which he would be maintained as a condition for his obligation to serve and an absolute right to wages.³² Servants who could prove that their masters abused them or failed to provide them with adequate food and board, could thus petition the justices to be released from service,³³ and could not be prevented from claiming wages provided that service was complete.³⁴

The Statute had been enacted at a time when neither the common law nor the manorial courts proved capable of securing Lords or employers control over, or access, to labour.

²⁸ Poos 1983.

²⁹ Poos 1983, 36.

³⁰ Dobb 1946, 65-66.

³¹ Steinfeld 1991, 60-63.

³² Hay and Craven 2005, 66, 78; Tait 2016, 465.

³³ Burn 1838, 789.

³⁴ Thus, it was said 'There is a distinction between this case and that of a common labourer, because where one is a common labourer, he will be force to labour against his will, and his salary is made certain by statute, so it would not be reasonable that he lose this salary for his service because of the death of his master, when he is obliged by law to serve, which will not be said his own act, but that of the law;' (1426) Pasch. 4 Hen.6, Fl.5 Pl.19b. See similar arguments in: (1425) YB Pasch. 3 Hen. 6, fl. 42a-42b, pl. 13, and (1433) YB Trin. 11 Hen. 6, fl. 48a-48b, pl. 5.

For this reason, it had been shaped both by customary assumptions about the relationship between Lord and tenant, and the form of the writ actions through which the institution of service was beginning to take effect.

Prior to the 15th century, the common law had provided no remedy to a master seeking to enforce a covenant to serve. The labour agreement was conceived as a covenant in relation to which, it not being evidenced by deed, the writ of covenant did not lie. Prior to the 16th century, the only remedy available to a party seeking to enforce an informal covenant was the writ of debt (or detinue). If the claim could not be framed in this form, the only remaining option was to rely on tort.

The writ of debt was available to a party seeking to enforce a simple contract that operated as a grant.³⁵ The transactions for which it lay were thus those which could be said to give rise to a proprietary interest in the debt being claimed. The essence of debt was therefore entitlement, often evidenced by an agreement, but based on the fact that something of benefit had been provided.³⁶

In the 13th and 14th centuries, the Courts allowed both workers and lessors to bring a claim in debt to recover unpaid rent or wages, provided that the parties could prove that the property for which the debt was owed had actually been enjoyed.³⁷ The nature of debt was such as to shift the focus away from the agreement between the parties, towards its proprietary effects.³⁸ Its application to claims for wages illustrates the pervasiveness of property ideas in the emerging law of master and servant. The premise underpinning these developments was that, the employer having enjoyed the benefit of the service that constituted the subject matter of the 'grant,' the worker had become absolutely entitled to the wage that was due for its enjoyment.³⁹ Given that the obligation to pay both rent and

³⁵ Simpson 1987, 79-80.

³⁶ Hall 1993, X.3-5; Ibbetson 2001, 19. See also: Fifoot 1949, 249; *Alice's Case* (1458) YB 37 Mich. Hen 6, fl. 8, pl. 18.

³⁷ On what had to be proven in debt, see: (1472) YB Pash.12 Edw 4, f.8, pl.22. See also: Ibbetson 2001, 39. On the point made in the text, see Simpson 1987, 48.

³⁸ Ibbetson 2001, 34.

³⁹ Simpson 1987, 48. See also: *Alice's Case*.

wages presupposed that the obligation on the other side of the contract had been fully performed, neither could be claimed until the end of the hiring period.⁴⁰

Prior to the enactment of the Statute, the options available to an employer were more limited. Service was not, in contrast to wages, reducible to a sum certain that could be claimed as a debt. Employers required a means to compel future performance, as well as a right to damages for a failure to perform. Under the common law, employers' only remedy lay in trespass.⁴¹ Before the 15th century, however, trespass was only available as a remedy for mis-performance, leaving the employer with no remedy in the event that the worker failed to serve.⁴² The fact that trespass was available is significant, however, for it expresses the idea that the 'harm' to the employer had been conceived not in the nature of breach of promise, but as a wrongful interference with some 'property' to which the employer was entitled. For this reason, a similar action was available against a third party for retaining or harbouring another person's servant.⁴³

Despite the relative paucity of remedies available to an employer, however, local courts had often provided employers with a right to compel a servant to serve, extending the remedy that had been available to the Lord to recover rent-services from a tenant in arrears.⁴⁴ It was a combination of these ideas that came to be embedded in the Statute. The Statute made it a criminal offence for a worker to depart from service. The courts equated this with any act of wilful disobedience and elaborated from it both a civil action for damages, and a right to compel the servant to serve.⁴⁵ The statutory action for departure had been conceived as a tortious action, an extension of the common law action that was available against third parties.⁴⁶ The underlying premise seems to have been that the

⁴⁰ Simpson 1987, 66. See also: Newton CJ in (1442) YB Mich. 21 Hen. 6, fl. 6, pl. 16; (1470) YB Mich. 49 Hen.6, fl.47, pl.23; Dalton 1690, 94.

⁴¹ Recognised in: 23 Edw III (1349); 25 Edw III (1351). See: Ibbetson 1982, 153.

⁴² Ibbetson 2001, 38. However, the courts recognised an action for departure on the statute for a purely executory contract as early as 1367. (1367) YB Mich. 41 Edw.3, fl.20a, pl.4. But Milsom and Baker note that this was conceived as within trespass: Baker 2010, 379, fn.3. See also: (1373) YB Mich. 47 Edw.3, fl.14a, pl.14.

⁴³ On this interpretation, see Simpson 1987, 48.

⁴⁴ Putnam 1970, 74. The Lord could bring the writ of customs and services to recover rent-services from a tenant in arrears. This mirrored the writ of right which lay to recover the land. On this, see: Ibbetson 2001, 37.

⁴⁵ Putnam 1970, 195. On wilful disobedience and departure see: Dalton 1655, 94.

⁴⁶ Simpson 1987, 48.

worker, as opposed to a third party, had wrongfully interfered with the employer's rights in his service, giving the employer a right to recover the property of which he had been deprived.

The Statute of Labourers set the framework through which the service relation was to develop.⁴⁷ Many of its provisions were consolidated and extended in the Statute of Artificers 1563, and it was this that provided the legal framework for the regulation of the labour until the 19th century.⁴⁸ The Statute of Labourer's origins in the declining system of feudal tenure, and its link with the developing institution of the lease, had a profound influence on the way in which this system was to develop. Enacted in part to supplement the customary mechanisms that were beginning to break down, and in part to fill a gap in the common-law writ actions, the Statute had firmly embedded in labour law discourse a model of service as a property relation in which certain mutual obligations were implied. Providing employers with a remedy in the event of departure, a good defence to which was the employer's failure to adequately maintain him, the Statute made it possible to read-in to the employer's property in service, a right to wages and to be maintained which, in combination, provided for a form of subsistence wage, a substitute for the tenant's right to occupy land in exchange for his Lord's right to his services.⁴⁹

The gradual differentiation of the landlord and employer functions that was taking place throughout the 14th and 15th centuries did little to change the significance of tenure as a mechanism for guaranteeing the distribution of land and labour in the emerging agricultural economy. Privity of estate between the parties to the lease expressed a similar idea, for the existence of concurrent interests in land gave rise to a set of mutual obligations designed to balance the interests of the parties.⁵⁰ The lessor's obligation to provide peaceful enjoyment thus presupposed the lessee's obligation to pay rent and to maintain the land and keep it in good repair. In the master and servant context, it is possible to

⁴⁷ Strengthened through additional statutes throughout the fourteenth century: (1388) 12 Richard II, c. 4; (1390) 13 Richard II Stat. 1, c. 8.

⁴⁸ (1563) 5 Eliz. 1 c. 4 'Statute of Artificers.'

⁴⁹ Failure to provide adequate food and board was a good defense to an action for departure: B. Burn and Burn 1805, 246-7; Burn 1838, 789.

⁵⁰ Holdsworth 1922, 1:vii, 268 onwards; Simpson 1987 46, 19.

identify a similar idea of privity, a form of 'privity of service.' This expressed the distinctive nature of the relationship between the parties, helping to protect the worker from exploitation while at the same time facilitating the employer's use of his labour. Employers' rights in labour were thus made conditional upon providing the worker with adequate food and board, and workers' right to wages on providing employers with loyalty and obedience.⁵¹

In the courts, the wage expressed the boundary between unfree villeinage and free labour, between custom and law as alternative bases for the regulation of social relations. For employers, the obligation to pay the wage reflected the distinction that was emerging between a purely customary entitlement to service, and a legally protected property right in labour, a form of property that could now be decoupled from rights in land. By the 14th century, the wage had become the precondition for the enjoyment of the benefits provided by the institution of service, a set of legal mechanisms that made it possible to better control, and regulate, the use of, and access to, labour.

3.2. The Evolution and Decline of Tenure and Subsistence in the Tudor Period

3.2.1 Socio-Historical Context

By the sixteenth century, much of the land held in England was being held on economic leases, with rents set by law and/or custom increasingly being replaced by rents set by the market.⁵² Landlords would offer leases to the highest bidder at whatever rent the market would bear, converting many of their customary holdings to leasehold.⁵³ Incentives to enclose increased, as land-owners' interests were becoming aligned with those of the emerging class of

⁵¹ See, for example: *Hawkesworth and Hillary's Case* (1668) 85 ER 435 discussing the obligations of a master and his apprentice.

⁵² Wood 2002, 102-3. Even remaining customary leases that gave rise to greater security of tenure, exposed tenants to competitive pressures with standards being set by competitive tenants responding more directly to the pressures of the market.

⁵³ Wood 2002, 101.

capitalist tenants; large land-holdings were essential if they were to be sufficiently competitive to meet their rental obligations.⁵⁴ Less competitive farmers lost their land, therefore, as the more competitive tenants squeezed them out of the market.

This process was a gradual one; complete wage-dependence remained a rarity throughout much of the sixteenth and seventeenth centuries. True, households were gradually becoming market dependent, in the sense that they needed access to the market to access their basic means of subsistence. But this did not mean that they were wage dependent, nor that they were entirely without access to land. Prior to the parliamentary enclosures of the eighteenth century, most households could still engage in some form of subsistence farming on the remaining common land, producing goods that could be traded in the market.⁵⁵ Engaging in wage-labour was for most only a supplementary source of income.⁵⁶

3.2.2 Statute of Artificers and the Law of Settlement

The legal framework regulating the service relation underwent a series of changes in the sixteenth century. Labour unrest, caused by a combination of inflation and labour scarcity, had prompted the State to intervene in an attempt to provide a check on prices and wages. The result of this was the Statute of Artificers 1563.⁵⁷ Like its predecessors, the Elizabethan statute established a system for magistrates to set maximum wage rates, but also sought to provide a compromise between national and local interests in relation to guild control over the urban trades.⁵⁸ Thus, alongside the wage-fixing provisions, the statute introduced a system of compulsory apprenticeship, the effect of which was to reinforce the powers of the guilds.⁵⁹

The Statute of Artificers was the central piece of labour legislation from the sixteenth to the early nineteenth century. Having re-enacted and extended many of the provisions of the Stat-

⁵⁴ Wood 2002, 103. See also: Brenner 1977; Brenner 1982.

⁵⁵ Wood 2002, 131

⁵⁶ Wood 2002, 131-2.

⁵⁷ Deakin and Wilkinson 2005, 47-8.

⁵⁸ Deakin and Wilkinson 2005, 47-8; Woodward 1980, 32; Žmolek 2013, 66-9; 4.

⁵⁹ Deakin and Wilkinson 2005, 47-8.

ute of Labourers, it also made possible the adjustment of wage-rates in line with inflation.⁶⁰ Legal control over wages, combined with new provisions on apprenticeships, slowed down the development of the labour market in both agriculture and the trades.⁶¹ Despite the emerging market in leases, therefore, wage-competition was still largely precluded; a legal compulsion to work and state-controls over labour mobility were still the principal mechanisms guaranteeing the distribution and utilisation of labour, and capitalist forms of employment remained effectively unlawful in the regulated trades.

The Statute of Artificers formed part of a much broader regulatory framework of which the Poor Law was an important part. By the early seventeenth century, the concept of the 'settlement,' which the Poor Relief Act of 1662 placed at the heart of the system of poor relief, provided the link between labour legislation and outdoor relief.⁶² Proof of service had become a condition not just for a claim for wages but also for relief in times of unemployment, for poor relief was conditional upon a year's service in the Parish in which that relief was being claimed. The concept of the settlement was based on feudal ideas about people's ties to particular locations, the idea that land, service, and social protection went hand in hand. Every person, whether villein or free, was thus a member of some local community to which he owed obligations and from which he was entitled to some measure of protection and, when in need, some undefined support. It was these premises that the system of Poor Law relief expressed.⁶³

By the seventeenth century, the concept of service had come to define the outer limits of the right to subsistence. In this sense, service was itself a form of property.⁶⁴ Providing one's service to an employer in exchange for an absolute right to subsistence, rather than ideas about self-ownership and property in one's own labour had, during this period, provided the foundations for the servant's freedom.⁶⁵

⁶⁰ Earlier Acts had set national maximum wage rates : (1514) 6 Henry VIII, c. 3 and (1515) 7 Henry VIII, c. 5. See also (1445) 23 Henry VI, c. 13. The new provisions were enacted in Statute of Artificers, 15–19.

⁶¹ Deakin and Wilkinson 2005, 206–7.

⁶² (1662) 14 Car 2, c 12. The Act of 1662 did not create the settlement entitlement; this was based upon the legal interrelation of the meaning of the Act of 1601: Dalton 1618, 705.

⁶³ Webb and Webb 1929, 314.

⁶⁴ Steedman 2007, 66.

⁶⁵ On settlement as a form of property, see: Sharpe 2000, 34.

During this period, the relationship between master and servant, by now a condition for both statutory wages and right to settlement, was seen to arise from a property relationship between an employer and the servant's service, characterised by exclusive and continuous control over the servant himself for the duration of the hiring. In this way, a basic principle of leasehold, the master's continuous possession and control, had become essential for identifying a labour relationship as one of service. During the same period, exclusive possession and control was also coming to determine the boundaries between a lease and a license, a boundary that was crucial to an occupier's claim to a settlement under the (alternative) head of renting premises at £10 a year.⁶⁶

Like leasehold, service continued to be firmly rooted in ideas of tenure, a property relationship in which mutual obligations were implied, characterised by one party's exclusive possession of an important social resource that was ultimately held 'of' or 'for' its owner and the Parish. These rights presupposed, however, that the owner, the lessor or the servant, had excluded himself from interfering with the other party's use of that property for the full duration of the hiring, conferring upon him property akin to that of an owner. This was expressed in the servant's open-ended obligation of obedience, and the lessor's obligation to provide peaceful enjoyment of land.⁶⁷ Influenced by feudal ideas of property, however, the reciprocal or mutual nature of these transactions were implicit, such that the enforcement of these obligations was conditional upon the lessee's or employer's obligation to maintain and protect the property in their control. For this reason, the courts would read-in this obligation so as to render these transactions enforceable.⁶⁸

⁶⁶ *Anon* (1703) 6 Mod. 33. See: Wonnacott 2012, 39-41.

⁶⁷ The covenant as to good title and to guarantee that the tenant would be able to enter and enjoy the property during the term without anyone else's permission were implied from the mid 13th century: (1276), Edw 1, c.6, 'Statute De Bigamis.' From 1598, it appears that such would be implied from the relationship of landlord and tenant: Pollock and Maitland 1898, vol.2 107, fn.1; Wonnacott 2012, 178.

⁶⁸ In the medieval period, it was usual for a tenant to covenant to return the property at the end of the term in the same condition as when the lease had been granted except in London, Norfolk and Ely. By the nineteenth century those customs were obsolete, and the usual tenant's covenant had become what it is today, a full covenant to keep and deliver up the demised premises in repair. *Hampshire v Wickens* (1878) 7 Ch D 555. See Wonnacott 2012, 184.

Implicit in this idea was that 'tenure', the relationship that arose as a result of the employer's rights to his servant's service, was independent from, and took primacy over, the contract as the basis of the parties' rights and obligations. It was actual enjoyment of the property rather than the promise to provide it that provided the basis of the ongoing relationship between the parties. The obligation to pay rent issued from the land, for example, and could be claimed from anyone enjoying exclusive possession as of right - even if that person had not been party to the original contract. Similar principles were applicable to the service relation; the right to wages 'issued' from the enjoyment of service rather than from the contract. It is this premise that was reflected in the legal structure of the debt claim as it applied to wages. It meant that the courts would imply a promise to pay from the fact of the service, and thus derive the 'hiring' from the service rather than vice versa. This meant too that the requirement for a hiring for a year could be satisfied either by proof of the agreement itself, or by evidence of service:⁶⁹ 'A contract of hiring may be inferred from the pauper having served a year as a husbandman,'⁷⁰ 'having served three years as a menial servant, though at first hired for only part of a year,'⁷¹ or having 'lived three years as an ostler'⁷² the position being that 'a hiring will be presumed from a general service.'⁷³

In this way the courts would construct, or imply, a contract from evidence that a service relationship had come into being, giving expression to the parties' rights and obligations in a form through which certain labour and social protections could take effect.

To an extent, such an approach was unavoidable given that most labour agreements were oral, for this blurred the line between an express and implied contract. Nonetheless, it emphasises that the premise was still that the underlying transaction, or relationship, provided the basis of the parties' rights and obligations rather than the terms of any 'free' agreement.

⁶⁹ *The Parish of Brightwell v the Parish of Henley* (1714) 88 ER 731; *Overton v Steventon* (1703) Fortescue 316.

⁷⁰ *R. v The Inhabitants of Lyth* (1793) 101 ER 183.

⁷¹ *R. v The Inhabitants of Long Whatton* (1793) 101 E.R. 252.

⁷² *R. v Holy Trinity in Wareham*, Cald 141, 2 Bott 539, cited in *R v The Inhabitants of Weyhill* (1760) 96 ER 113.

⁷³ *Crediton and Wincanton* (1749) Burr Sett Ca 299. But this presumption may be rebutted by facts showing that the relation of master and servant did not exist: *R v Walton* 100 (1790) ER 708. See also: Burn 1785a, 443.

Even though from the sixteenth century *assumpsit* was increasingly being brought by parties where debt might have been more appropriate, the courts continued to treat the indebtedness as the basis of the obligation, that is, the fact of service, and would thus imply a promise to pay so that it could be enforced.⁷⁴ In the settlement cases and in claims for wages, therefore, the question for the courts was whether or not the master had actually enjoyed exclusive control over labour for the duration of the hiring. For the most part, the existence of an antecedent promise to serve, or to pay, continued to be relevant only if service had not commenced,⁷⁵ for ‘if a man retaineth a labourer or servant to serve him according to [the] statute (of Artificers) though no wages be spoken of upon the retainer, yet the retainer is good, and they shall have such wages as is affected and appointed by Proclamation.’⁷⁶ This reflected the enduring premise that

‘...the fact of the service is always capable of distinct proof; *for it is collateral and subsequent to the contract itself*. The pauper served...he served without any thing being said as to wages. The stress of the argument seems rather to show that there were no certain wages reserved than that there was no hiring ... if the rate of wages were not specified, he would be entitled to reasonable wages.’⁷⁷

The same principles applied when determining whether a master could avail himself of the statutory action for departure. The master could only enforce his property in service if there existed a right to that service, implied from the existence not only of a contract, but of the relationship from which that contract was implied. The action would lie, therefore, even in the absence of a legally binding covenant to serve because a hiring would itself be presumed from service. The consideration (or *quid pro quo*) for statutory wages was service, in other words, proven by ongoing loyalty and obedience. If this could be proven, there existed a le-

⁷⁴ Ibbetson and Barton 1990, 84.

⁷⁵ See: *R v Buckingham* (1834) 110 ER 1043. See also Lord Kenyon’s judgment in *R v Hilton*, 5 TR 672, discussed in: Theobald, 1836, 352. These cases show how the courts would draw upon evidence of how wages were paid, if they were paid, to go towards establishing the existence of service; this did not, however, determine their legal rights and obligations; these were attached to the status which these elements wet towards proving.

⁷⁶ See: Dalton 1690, 92.

⁷⁷ *R v The Inhabitants of Pendleton* (1812) 104 E.R. 913, 914-15.

gally enforceable contract of service, and the rights and obligations intrinsic to it could be enforced.⁷⁸

The similarities with the lease concept go further, however, for even the conveyance by which apprentices or indentured servants were hired took a similar form to written lease contracts. Labour indentures ‘give, grant and assign’ the individual *to* a master, and conferred upon him property *in* the servant or apprentice that he could assign.⁷⁹ In both cases, while the indenture or lease contract created privity of contract, it was the entry into service, or actual enjoyment of property, that implied a distinct form of privity, or tenure, and it was this that gave rise to the mutual obligations that provided the basis of the ongoing relationship between the parties. If the master assigned his apprentice, therefore, although he would remain liable under the indenture, the obligation to pay wages would lie with the beneficiary of the service. This also meant that it was the Parish in which the service relation existed, rather than the residence of the master with whom the contract was concluded, that determined where a settlement would be gained.⁸⁰

The statutory framework underpinning these settlement cases was conceived with a particular context in mind. It had been enacted prior to the emergence of a fully-fledged market in leases, at a time when the majority of land in England continued to be subject to customary rights, providing the poor with an alternative to wage-labour - subsistence farming - as a means of subsistence. For this reason, the service relation was relatively insignificant in the context of the broader agricultural economy as a whole; productivity lay primarily in the hands of those in possession of the means of production. By the end of the eighteenth century, however, this was no longer the case. The market in leases, and the enclosures it stimulated, had by this time dispossessed a large proportion of the tenant population, fundamentally transforming the form and function of the service relation in the process, and with it, the form and function of the wage.

⁷⁸ (1443) YB Mich. 21 Hen. 6, fol. 8b-9b, pl. 19 (concerning an action against a third party for beating a servant where no express covenant, but actual service).

⁷⁹ Burn 1785a, 1:98.

⁸⁰ See for example the cases explored in: Burn and Burn 1793, 412-4.

3.3 Eighteenth Century England and the Emergence of the Modern Labour Market

3.3.1 Socio-Historical Context

By the 18th century, all but the most efficient tenant farmers had been driven out of the market. Enclosure had been proceeding apace as both landlords and tenants sought to increase the productivity of land. This required consolidating and expanding the size of holdings, extinguishing customary rights through enclosure and converting the remaining common land to leasehold. By the first half of the century, this process was already generating enormous change, depriving a growing number of peasants of access to all alternative forms of employment. By the end of the eighteenth century, the transformation was near-complete.⁸¹

Enclosures had been concentrating land in the hands of a privileged few. Domestic manufacture and factory industry expanded as growing numbers of people looked to wage labour as their primary, or sole, source of subsistence. This, and the population growth that a rapidly increasing food supply facilitated, contributed to the growing number of workers who were now being employed in manufacturing enterprises in the towns.⁸² The developments taking place in agriculture from the fourteenth century onwards had thus gradually paved the way for the emergence of industry. The gradual dispossession of customary tenants and the market dependency that followed had helped to foster the development of cottage industries and the growth of the national market. The result was a large home market for cheaply produced, cost-effective goods, made up of a ‘free’ labour force that could be hired to produce it.⁸³

During the course of the eighteenth century, the practice of paying money-wages had also become increasingly common. Money-wages and living out was gradually replacing living-in and benefits in kind as even agricultural employers sought to respond to higher wage costs by

⁸¹ Žmolek 2013, 369.

⁸² Žmolek 2013, 224.

⁸³ Wood 2002, 140-1.

shifting the costs of subsistence onto their workers.⁸⁴ Even in agriculture, therefore, the practice of paying money wages had slowly freed the labour relation from ‘customary’ forms of regulation and associated ideas of tenure, much as had the commutation of labour rents in respect of land-holding centuries before. The growing number of persons receiving cash payments in poor relief also facilitated this process, for this too contributed to the market-dependence that would fuel the development of the industrial economy.⁸⁵

Towards the end of the century, when wartime inflation, combined with grain shortages, drove the price of wheat to previously unseen heights, the drive towards substituting living-in and benefits in kind with money-wages increased along with rural unemployment.⁸⁶ By the end of the century, the number of wage-assessments had rapidly declined and the higher courts had become increasingly hostile to workers’ attempts to compel magistrates to set wage-rates.⁸⁷ In parallel, the apprenticeship provisions had fallen into disuse and the right to settlement was being interpreted so narrowly that poor relief was being denied not just to the emerging class of industrial workers but also to many domestic servants and servants in husbandry.⁸⁸

3.3.2 The Decline of the Elizabethan Framework

Prior to the nineteenth century, where a worker without visible means of subsistence contracted to serve, the courts presumed this to be a hiring for a year that would be subject to the labour and poor relief statutes, with the master bound to maintain him for the full year.⁸⁹ In the early 19th century, this was paralleled by a similar attitude towards industrial workers, with the courts refusing to enforce contracts where the employer sought to retain servants for long periods without promising to maintain them or employ them so as to provide a regular wage. The basic premise was that ‘if the [contract of service] withdraws the workman from

⁸⁴ Hobsbawm and Rudé 2001, 44-7.

⁸⁵ Žmolek 2013, 357-8.

⁸⁶ Žmolek 2013, 553.

⁸⁷ Deakin and Wilkinson 2005, 53; see Lord Ellenborough in *R v Kent Justices* (1811) 104 ER 653.

⁸⁸ See for example *R. Burn* 1785b, 3:439-40. Here limited hours of work for Shearman also denied the right to settlement, construed as an exceptive hiring.

⁸⁹ Hay and Craven 2005, 66.

labouring for the community generally, without any obligation on the masters to employ him, it is invalid' and would be void for 'want of mutuality.'⁹⁰

Prior to the mid-19th century, the service relation, as something to which statutory wage-rates and common law mutual obligations applied thereby occupied the field as regards (dependent) wage-labour.⁹¹ Even for the purposes of the master and servant legislation the courts were emphatic that a contract of service differed from an ordinary contract between legal equals. It envisaged a particular type of relation between master and servant and, to be enforceable, there had to be something provided in consideration for the service itself and not just wages for work:

'The answer to the objection [that there was no consideration] was, that a consideration for the promise would necessarily result, because the plaintiff had paid Bradley for his labour. But so he must have done under any contract; the work must have been balanced by wages; but there is no consideration for the workman's hiring himself to the plaintiff exclusively.'⁹²

Despite a much broader interpretation in *Lowther v Earl Radnor* in 1806, piece-rate workers, and those not hired to serve a single master exclusively, were thus implicitly excluded from the scope of the Master and Servant Acts.⁹³ The concept of 'service' continued to be confined to those who did not stand 'in the position of two contracting parties' but in the 'relation of master and servant', selling their entire capacity to work, rather than commodified labour.⁹⁴ It was with these workers only that the courts associated the concept of service, and its corollary, the implied right to subsistence, whether this took effect through an implied obligation to retain and employ, or through the implied right to be protected and maintained.

⁹⁰ *Pilkington v. Scott* (1862) 15 M. & W. 657, at [659] (argument for the labourer). This was upheld by the courts in a number of cases prior to *Pilkington*: *Sykes v Dixon* (1839) 112 ER 1374.

⁹¹ Casual or day-labourers were distinguished in legal discourse from servants, hired to complete a specific job or task, usually as a supplement to other forms of subsistence. See: Steinfeld 1991.

⁹² *Sykes*, 103-4.

⁹³ *Lowther v Earl Radnor* (1806) 103 ER 287.

⁹⁴ *Lancaster v Greaves* (1829) 109 ER 233; *Hardy v Ryle* (1829) 109 ER 224.

By the end of the 18th century, however, the individuals appearing before the courts in settlement claims were no longer confined to adolescent agricultural or domestic workers, but also included many adults engaged in industry, hired in bulk under standardised, often written, work agreements that set regular hours and clearly defined their duties and rates of pay.⁹⁵ The Elizabethan legislative framework was ill-suited to this new context, premised on a society of semi self-sufficient peasant farmers and independent craftsman that was fundamentally at odds with the society that was emerging, one based predominantly on the exploitation of labourers dependent on money wages.⁹⁶

It is in this context that the courts developed the concept of the ‘exceptive hiring.’ This referred to any contract of service that envisaged periods where ‘the master could not have demanded the service at any time throughout the twenty-four hours’ for the full year.⁹⁷ By invoking this concept, the courts were able to distinguish between those in service, those who alienated their labour absolutely for a fixed period of time, and those that merely sold their labour for wages, for the purposes of excluding the latter from the scope of the wage-fixing and settlement provisions of the Elizabethan framework.

By the end of the eighteenth century more and more contracts were being classed as ‘exceptive.’ This reflected the fact that growing numbers of workers were now being hired in a social and economic context that demanded new forms of work arrangement, ones which were fundamentally at odds with prevailing assumptions about the nature of service. The courts thus began systematically excluding from poor relief all those industrial workers whose contracts reserved to them *any* time during which they were free from their master’s proprietary control. Restrictions on hours of work, a right to a day’s holiday or time away with friends, or to terminate the contract on short notice, were all classed as exceptions in the contract capa-

⁹⁵ *Birmingham*; *R v Kingswinford*, (1791) 100 ER 983; *R v Norton Bavant* (1835) 111 ER 374; *R. v. Mitcham* (1810) 104 ER 137. But contrast with: *R v Hampreston* (1793) 101 ER 116; *R v Great Yarmouth* (1816) 105 E.R. 993.

⁹⁶ Žmolek 2013, 555.

⁹⁷ *R v St Helen’s Auckland 2 Law J (N.S) M.C 58*; *Wrington*, per Foster J.

ble of depriving the worker of a settlement.⁹⁸ The essence of the exceptive hiring was thus that the relationship was discontinuous, it did not confer upon the master property in service for a pre-determined period of time but made provision for certain excepted periods during which ‘there is not the relation of master and servant.’ This was because ‘in each short period that is excepted...the master would not have dominion over the servant.’⁹⁹ Even the possibility of returning home after the factory closed at the end of the day, or remaining at home on Sundays, negated the existence of service: ‘a right of control and authority, at least so far as it relates to the general discipline and government of the servant, must reside in the master at all times during the continuance of the service.’¹⁰⁰

Following the repeal of the Poor Law Amendment Act (1834) and repeal of settlement by hiring, however, the courts began to take a much more functional approach when it came to the personal scope of the master and servant legislation.¹⁰¹ The Master and Servant Acts had re-enacted, but extended to a larger class of workers, the primary provisions of the Statute of Artificers.¹⁰² Nonetheless, particularly from 1823, the emphasis of the legislation had been decisively shifted away from state control of the economy, towards more direct support for employer control over workers in production through criminal penalties for breach of contract.¹⁰³ The Acts thus extended the sanctions imposed for departure or breaches of work discipline, and over time included within their scope a much broader class of person, while further relaxing the assumption as to an annual hiring.

By the middle of the century, the courts had fallen into line with Parliament’s intention to extend the Act beyond ‘servants’ in the traditional sense to wage-workers generally, anyone who ‘contracts...to serve...for any time or times whatsoever, *or in any other manner*’¹⁰⁴ including skilled artisans and piece-rate workers not bound to serve one master exclusively for

⁹⁸ *R v Gateshead* (1852) 117 E.R. 1485; *Kinsgwinford*; *Birmingham*; *Norton Bavant*. See: Theobald 1836, 345-57.

⁹⁹ Theobald 1836, 345.

¹⁰⁰ *Wrington*, per Foster J.

¹⁰¹ The Old Poor Law was repealed in 1834 and the Statute of Artificers in 1813 by: 53 Geo. 3 c. 40.

¹⁰² 13 George II c. 8; 22 George II c. 27; 17 George III c. 56; 32 George III c. 44.

¹⁰³ 10 Geo IV, c. 52.

¹⁰⁴ 10 Geo IV, c. 34.

a minimum term.¹⁰⁵ In this way, for the purposes of the Acts at least, the concept of service had gradually shed ideas associated with the distinctive property relationship between master and servant, with the term servant increasingly being used to refer simply to all those who, in one capacity or another, sold their labour for wages. Only higher-status managerial employees were consistently excluded from the scope of the Act.¹⁰⁶ In order that contracts at piece-wages that sought to bind workers to the employer for long periods of time not be void for ‘want of mutuality’ moreover, the courts proved increasingly willing to imply an obligation to retain and employ so as not to deprive an employer of the criminal penalties under the Acts.¹⁰⁷ This did not mean that workers had an enforceable right to be paid during lay-off, however, nor any right to a guaranteed minimum amount of work or pay. Instead, it simply meant that the contract would not be void for want of mutuality even if no subsistence wage was paid. Rather than implying an obligation to pay where work was not actually provided, therefore, the *quid pro quo* for service became not a subsistence wage, but an obligation to provide work in accordance with the state of the trade.¹⁰⁸

3.3.3 Free Trade and the Combination laws

Prior to the late 18th century, the exclusive and near-complete control associated with medieval ideas of service was seen to justify imposing on the employer an obligation to maintain and protect the worker in his control. The logical implication of this, however, was that these new service relations that left the worker free in certain respects, whether due to limits on the working day or the type of work performed, could give rise to no such obligation, leaving it to the contract to allocate the risk of a downturn in demand. It is in this context that there began to emerge a distinct concept of the wage as the price of personal labour, the price of an alienable commodity, the payment of which no longer implied an obligation to bear the costs of the worker’s subsistence.

¹⁰⁵ *Hartley v. Cummings* (1846) 175 E.R. 180; *Pilkington*; *Lawrence v. Todd* (1863) 143 E.R. 562; *Re Bailey* (1854) 118 ER 1269.

¹⁰⁶ *Branwell v Penneck* (1827) 108 ER 823; 7 B. & C. 536.

¹⁰⁷ *R v Welch* 22 L.J. (n.s.) (mag. Cases) 145; See Lord Denman in the report of the same case: (1853) 118 E.R. 800, 802; *Pilkington*; *Saunders v Whittle* (1876) 33 LT 816.

¹⁰⁸ See: *Welch*; *Pilkington*; *Saunders*.

The idea that an employer ought to bear the costs of his worker's subsistence had fallen out of favour throughout the 18th century, alongside the Poor Law and the Speenhamland system with which the latter (wrongly) came to be associated.¹⁰⁹ To followers of Adams Smith, the laws of settlement were a restraint on free trade, and the institution of service an affront to freedom and independence.¹¹⁰ To followers of Ricardo and Malthus, they reflected alternatives to the market as a mechanism for securing an efficient allocation of resources, one that was liable to distort the distinctive incentive structure that lay at the heart of capitalist wage-labour.¹¹¹ These institutions moved resources out of the real economy, 'interfering' with the laws of supply and demand, thereby reducing the stock of resources available to be paid as wages.¹¹²

These ideas underpinned the rejection of Samuel Whitbread's Minimum Wage Bill in 1793 and 1800¹¹³ and the Poor Law Commissioners' Report of 1834.¹¹⁴ By the early 19th century, state-control of wages and poor relief had been firmly rejected in favour of the more efficient and less coercive mechanism of free competition in the market. Promoting the free circulation of labour had thus become a central tenet of social and economic policy, with the political environment extremely hostile to the very idea of legally regulated wages.

'Trade industry and barter would always find their own level, and be impeded by regulations which impeded their natural operation...to promote free circulation of labour...would go far to remedy the evils [of low pay].'¹¹⁵

These ideas also shaped policy-makers' attitudes towards worker combination. Restrictions on combinations had initially emerged as an integral part of a system of wage-fixing and centralised trade regulation, implied by the wage-fixing and apprenticeship provisions of the

¹⁰⁹ Smith 2015, Book I, 98-99. See also his criticism of slavery on similar grounds, 387. See the discussion in Žmolek 2013, 525.

¹¹⁰ Smith 2015, Book 1, chapter 10; chapter 2.

¹¹¹ Ricardo 1821, 61.

¹¹² Žmolek 2013, 729-30.

¹¹³ S. Williams 2013, 94.

¹¹⁴ S. Williams 2013, 94.

¹¹⁵ Cobbett and Hansard 1807, 2:703-11.

Statute of Artificers. In response to labour unrest throughout the 18th century, further statutes were passed with a view to targeting combinations in specific industries. The first was enacted in 1720 in the tailor trade, and rendered void and illegal agreements to increase wages.¹¹⁶ Further targeted legislation followed in a number of trades, followed by a more general combination law in 1749, each of which was linked to some form of wage-fixing machinery.¹¹⁷ By the end of the century, however, this had been replaced by the Act of 1799 which, for the first time, enacted a general prohibition on worker combinations not coupled by any attempt to regulate wages.¹¹⁸

In prior legislation, therefore, prohibitions on combination had been implicit in, and largely incidental to, the regulation of industry, the quid pro quo for which being provisions for setting wages and hours and/or prohibitions on truck. By the turn of the century, however, wage regulation had been abandoned, and with it, (decentralised) state control over the economy. In its place, there existed general legislative and common law prohibitions on combinations and a system of wage-regulation based entirely on individual freedom of contract.¹¹⁹

Closely linked with this was a growing opposition to the guilds and apprenticeship system. Before the end of the 18th century, compulsory apprenticeship and customary wage-rates had effectively barred the emergence of capitalist forms of employment in manufacture.¹²⁰ Growing divergence of interests between masters and journeymen throughout the century, however, had given a new colour to the growing swathes of regulation designed more specifically to suppress worker combinations and facilitate free trade. The hostile attitude towards combination was thus a symptom of a much more widespread feeling of discontent with the corporatist economy.

By the 1820s, however, economic orthodoxy was shifting. McCulloch and Hume, supporters of Place's Repeal Bill, had made their case for repeal of the combination laws by arguing that

¹¹⁶ 9 George I, c. 27, 12 George I c. 34 and 13 George II, c. 8.

¹¹⁷ 22 George II, c. 27.

¹¹⁸ 39 Geo. III, c. 81. A further Act supplementing this was passed in 1800: 39 & 40 Geo III c. 106.

¹¹⁹ Orth 1991, 67.

¹²⁰ Deakin and Wilkinson 2005, chapter 2; See also: Schmiechen 1984.

unions were incapable of forcing wages above their natural level.¹²¹ The market was itself best placed to keep wages in check, and so would prevent any ‘distortions’ taking place. If the wage is an objective sum that is fixed by supply and demand, in other words, ‘combinations’ are not interferences in the market, but part of the process through which free competition gives rise to an equilibrium wage. The combination laws were unnecessary, therefore, and by increasing hostility, actually posed a threat to continuous and stable production. It was the laws against combination, rather than unions, that were liable to ‘distort’ the market.¹²²

In 1825, the combination laws were repealed, and common action in pursuit of raising wages was legalised.¹²³ In fact, however, due to developments in the common law of conspiracy and restraint of trade, there was still little scope for collective bargaining.¹²⁴ The principle of collective wage-setting mechanisms was thus accepted, but only grudgingly, and Parliament made little attempt to directly facilitate it, leaving this, like all other things, to the market.

By the mid-19th century, therefore, space for collective wage-setting mechanisms had formally increased, but for the growing army of ‘sweated’ workers, the scope for improving terms and conditions through collective mechanisms was marginal. This was compounded by the dispersed and isolated conditions in which many of these workers worked, the effects of which was exacerbated by the fact that the once comprehensive system of outdoor relief had, by virtue of the New Poor Law, been replaced by a constant threat of the workhouse.¹²⁵

3.4 Nineteenth Century England, the Decline of Service and the Emergence of Sweated Labour

3.4.1 Socio-Historical Context

¹²¹ Orth 1991, 69; Rule 2014, 285; Žmolek 2013, 665.

¹²² Žmolek 2013, 663.

¹²³ 6 Geo 4 c 129.

¹²⁴ *R v Rowlands and Duffield* (1851) 117 E.R. 1439; *O'Neill v. Longman* (1863) 122 E.R. 500; *Walsby v Anley* (1861) 121 E.R. 536.

¹²⁵ Deakin and Wilkinson 2005, 219.

By the end of the 19th century it had become relatively easy for capitalist entrepreneurs to set up business, capitalising on the growing market for cheap manufactured goods, and taking advantage of the courts' more lenient approach to the apprenticeship provisions of the Statute of Artificers.¹²⁶ Supporting this move was the growing legislative and judicial hostility towards any form of worker combination designed to raise wage-rates or interfere with 'free trade.' There was thus little effective opposition to employers not apprenticed to a trade establishing themselves with a view to putting-out artisanal work to cheaper labour so as to circumvent customary wage rates.¹²⁷

The putting-out system or 'out-work' was based upon an intense sub-division of tasks that would once have been performed by a single artisan or craftsman apprenticed to the trade. By parcelling out individual tasks each of which required minimal skill, employers were able to employ relatively unskilled workers at low wages, increasing the supply of labour, and further depressing artisanal wage-rates. The greater the subdivision of tasks, the lower the grade of the worker, and the lower the pay, but at the same time, the more easily standardised, monitored and controlled was a worker now employed by a master with little or no experience in the trade.¹²⁸

This task-based system was not unique to out-work. It was also characteristic of the internal-contracting system that prevailed in many of the factories.¹²⁹ In both cases, an implication of the sub-division of tasks was that a number of intermediaries were required to co-ordinate the production process.¹³⁰ In the internal contracting system, for example, contractors or supervisors would contract with the master employer to perform a particular job in return for piece-rates, and they would then be responsible for hiring workers and paying them to produce the good. In this context, many artisans had been able to retain a relatively privileged position because this role often required familiarity with the trade. Nonetheless, the introduction of a

¹²⁶ *Raynard v Chase* (1756) 97 E.R. 155; *Smith v Company of Armourers* (1772) 170 E.R. 128; Peake 199, 200; *Coward v Maberley* (1809) 170 E.R. 1103.

¹²⁷ See: Brown 1982, 29-30.

¹²⁸ Webb and Freeman 1912, 81.

¹²⁹ Littler 1982, chapter 6; Pollard 1963.

¹³⁰ Bythell 1978 18-19.

middleman into the equation increased the numbers of those interested in appropriating the surplus generated in production, and this further increased the scope for depressing wages.

In industries in which outwork was common, middlemen or intermediaries were primarily responsible for distributing work between outworkers and collecting it and arranging for its sale. For this reason, they did not need to be skilled in the trade. Given that a single product might be passed to a large number of workers, moreover, these middlemen often had little choice but to produce on speculation.¹³¹ This gave rise to an even greater incentive to manipulate wage-rates, in order to shift the risk of unforeseen market fluctuation onto the workers. Charging prohibitive rents for tools or machinery, and imposing fines for poor workmanship were just some of the common strategies employed for this purpose, further depressing the wages of the already chronically underpaid.¹³²

3.4.2 The Truck Acts

The outwork system was ultimately a technique invoked by employers and contractors to shift onto workers some of the risks and costs associated with production, now tailored to a mass-consumer market. This form of work organisation was such, however, that depression of wage rates was the only realistic cost-cutting mechanism at the employer's disposal, for most of the capital costs involved in the production process were already shifted onto the workers.¹³³ If there was an increase in demand, it would only be worth switching to more centralised, capital intensive production if the upswing could be expected to continue. Otherwise, any pressure on wage-rates would soon be off-set by the advantages of having excess workers to hand when conditions returned to normal. The outwork system was not only a problem for workers, therefore, but proved detrimental to the progression towards mechanisation, vertical integration and in-house production. So long as outwork labour remained plentiful, with its price falling ever lower, there was little incentive

¹³¹ Bythell 1978, 189-90.

¹³² 'The wages actually received by the workmen ... differ from the price of their work ... [s]uch difference being occasioned by deductions ... [and] other charges made by the 'middleman': Great Britain. Parliament. 1855, iii- iv; Muggeridge 1845, 83; Mayhew 2016, 102-3, 117.

¹³³ Schmiechen 1984, 53.

to invest in labour-saving machinery, nor to take-on the prohibitive capital cost associated with factory production.¹³⁴ The incentives towards vertical integration and factory production were minimal.

Even for employers, however, neither sub-contracting nor outwork was without its drawbacks. The decentralised nature of the production process was such that monitoring and supervising work was particularly difficult. This made it hard both to predict how much could be produced and in what time-frame, and to maintain control over work quality. Lacking any alternative means to control the labour process, many employers resorted to manipulating the pay-system with a view to inducing more efficient work.¹³⁵ Low wages were made ever-more precarious, therefore, as payment in truck, the imposition of fines and the making of various ‘stoppages’ from wages became increasingly common.

This system came to be known as the ‘truck system.’ In its narrowest sense, it referred to a practice of substituting benefits in kind for money wages in order to artificially depress wage-rates.¹³⁶ In its broader sense, however, truck involved any attempt by employers to reduce contractually agreed wages, whether by paying in goods, imposing fines and charges, or requiring workers to spend their wages at a shop run by the employer. These practices were most common in industries where sub-contracting and the involvement of middlemen were common. This was so particularly in industries with standardised wage-rates, for it provided smaller employers with a competitive advantage in an environment in which they might otherwise be squeezed out of the market.¹³⁷

In light of this, it is perhaps no surprise that some of the most active opponents of the system were the larger manufacturers concerned to put an end to what they saw as unfair competition.¹³⁸ In this context, truck rather than any proposed legislation designed to suppress it, appeared as the illegitimate incursion into the parties’ freedom.

¹³⁴ Bythell 1978, part two, particularly 177; Great Britain. Parliament. 1855 (c. 421) p. iv.

¹³⁵ Bythell 1978, 155.

¹³⁶ Hilton 1960, 14.

¹³⁷ Hilton 1960, 14-15. Truck was not confined to out-work, but it was in this context that the practice was particularly prevalent. Brass 2011, 63, fn. 54.

¹³⁸ Hilton 1960 16-17; HC Deb 17 March 1830 vol 23 cc461-74, 470 per Mr Littleton.

Policy-makers referred to the truck system as a form of slavery between a worker and his employer,¹³⁹ for ‘in the truck system’... ‘one party is not a free agent, ... [he is] under the complete control of the other...’¹⁴⁰ Payment in truck interfered with ordinary principles of contract enforcement, and thus weakened the contract as a mechanism for providing stability in exchange. By preventing a worker from assessing whether his employer had actually paid the wage which he had agreed to pay, this made it difficult for the courts to intervene to enforce the contract.¹⁴¹ The truck legislation was thus a legitimate exception to the principle of non-intervention because it did not encroach on the parties’ agreement itself, ‘but only interpose[d] to ensure the just fulfilment of contracts already made:’¹⁴²

‘Members who had opposed this Bill had argued upon a false foundation. They had assumed that the labourers were always competent to make contracts, whereas they were in every case in debt to their masters, and therefore it was impossible for them to resist the control of their masters, and they were obliged to take goods from them at any rate. All that this Bill did was, to enable the labourers to know what were the bargains they did make.’¹⁴³

Legal control of truck was not, therefore, a form of wage ‘regulation’, and so was entirely consistent with an economic policy geared towards free trade. The Truck Acts were simply a mechanism for enforcing contracts already (or deemed to be) agreed. Implicit in the Act was a view of the wage as something that emerges spontaneously from the market process, something that is, and ought to be, dictated by the market - not to be distorted, therefore, by either the State or employer abuse of power.

¹³⁹ HC Deb 12 April 1831 vol 3 cc1256-9, per Mr Whitmore and Lord Sandon.

¹⁴⁰ HC Deb 17 March 1830 vol 23 cc461-74, 461, 463, per Mr Littleton.

¹⁴¹ HC Deb 12 April 1831 vol 3 cc1256-9, particularly 2159 per Mr Althorpe. See also: *Sharman v Sanders* (1853) 138 ER 116 per Maule J at [176] and Per Bramwell B in *Archer*.

¹⁴² Bailey 1859, 1-3.

¹⁴³ HC Deb 12 April 1831 vol 3 cc1256-9 at 1259, per Lord Althorpe.

In this sense, the Truck Acts did reflect a subtle shift in attitude; policy-makers were gradually recognising that labour law had to play a more active role in the labour market than merely passively enforcing contracts and protecting private property rights. Labour law had an important role to play in providing the conditions for free competition to emerge because it could not be assumed that wage-dependent workers were naturally or inherently free to reject the terms being offered – especially given the socio-economic context in which they sold their labour:

'But although, looked at in the abstract, he would be free to agree or decline, yet it is evident that viewed in another aspect, he would be compelled to fall in with the terms offered; for it is contrary to common sense to suppose that if there had been nothing to urge him, he would have voluntarily submitted to that reduction of his wages, and exposure to oppression, which would necessarily follow from his agreement [to be paid in goods]. No; there would be the weak power opposed by the strong, and the former consequently obliged to yield; inability on the part of the workman to procure employment under another, — stern want coming upon himself and his family, — and the fact that half a loaf was better than no bread; — one or all of these causes, or some other similar cause, must have been at work to compel him to agree to such a bargain.'¹⁴⁴

The Truck Act defined the wage as 'any money or other thing had or contracted to be paid, delivered or given as a recompense, reward or remuneration for any labour done or to be done.' This constituted the consideration for labour for which the monetary wage was payable in full and 'in the coin of this realm.'¹⁴⁵ The link between the wage and labour done, or to be done, rather than service, made explicit the conceptual link between wages and commodified labour. For those engaged in industry, this meant that if the worker actually produced the good, or performed the task envisaged by the contract, he had an absolute right to be paid its market-value and this was not something that could be waived by agreement.

¹⁴⁴ Bailey 1859, 6. This is echoed in: HC Deb 12 April 1831 vol 3 cc1256-9, 1257, per Mr Whitmore.

¹⁴⁵ Section 25(3).

The Truck Act 1831 was the first legislation to make explicit the worker's absolute right to be paid the monetary value of his labour, a right that was given a quasi-proprietary status because it arose independently from, and could not be qualified by, the terms of the contract. If labour was provided, there was an implied obligation to pay its value, independent from any express promise to pay - value here being synonymous with the contractual rate or, where unspecified, the 'going rate' in the trade. Parliament and the courts were thus beginning to embrace a more active constituting role for the law in relation to the labour market, requiring that employers pay at least the value of the labour embodied in the product that they claimed from the production process. The problem, however, was that this expressed the absolute limit of what workers were entitled to be paid in connection with their employment, and so this right to be paid the value of labour was expected to perform the socio-economic functions of *both* the market and subsistence wage.

In a series of cases throughout the 19th century the courts confirmed that the Truck Act only bites once the wages 'properly payable' had been ascertained. This meant that deductions by way of charges for machinery were not deductions from wages within the meaning of the Act, but part of the process by which the wage itself was fixed.¹⁴⁶ Consistently with this, in cases concerning deductions, or fines, for bad or negligent work, the court proved willing to imply, by reference to the 'custom of the trade' that deductions for poor workmanship in fact reflected the process by which the wage was calculated rather than deductions per se. The wage that was properly payable was, as in sale contracts, coextensive with the value of the benefit actually received:

'What is contracted to be paid for his personal labour is wages, and what is more than that is not wages...the price (of the finished good) is not merely wages, but wages plus an addition for the work done by the stocking frame (capital) ...deductions are

¹⁴⁶ *Chawner v Cummings* (1846) 115 ER 893; *Archer*.

admissible if they really come not out of wages properly so-called, but out of previous additions to those wages'.¹⁴⁷

The courts thus treated as indistinguishable the claim in debt for unpaid wages, actions for the price in a sale contract, accounts for work and labour, and claims in quantum meruit. In each case, the price could only be claimed if the good was actually received. If the good was defective in some way, the claim was for the value of the benefit received, even though 'formerly it was the practice, where an action was brought for an agreed price of a specific chattel, sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross action for breach of the warranty or contract.'¹⁴⁸

The wage had thus emerged during this period as the price of a commodity. The contract of service had lost its distinctiveness as a contract that envisaged ongoing mutual obligations, therefore, for if labour had been rendered, the only remaining obligation lay on the employer to pay for that labour, leaving it to the worker to secure himself his subsistence.

The only difference between contracts concluded between independent contractors and their customers, and employers and labourers/or artificers, was the degree of protection that Parliament assumed that the latter required in order to be in a position to freely contract. Thus, as summarised by Lord Hanworth in 1931, the position was that:

'The relation between master and servant is established by a contract between them, a contract which is subject to the rules applicable to other contracts except insofar as statute law has superimposed limitations, or rights, *inter se*.'¹⁴⁹

¹⁴⁷ *Archer*, 1005.

¹⁴⁸ *Mondel v Steel* (1841) 151 E.R. 1288; 18 Meeson and Welsby 858, Per Pollock B at 870-1.

¹⁴⁹ *Sagar v H Radelhaigh & Son* [1931] 1 Ch. 310 (CA), 326.

The distinction between those that fell in the latter category, labourers engaged by employers, was said, for the purposes of the Truck Acts, to reflect the distinction between those that sold their labour for wages, and those that agreed a price for a contract, a distinction that turned primarily upon questions of socio-economic status. Thus, the purpose of the Act being to secure the payment of wages for labour, the courts tied the Act's scope to the existence of a wage-dependent worker with nothing but 'his personal labour to sell' for 'only then was the payment to him to be classed as wages.'¹⁵⁰ Those in a position to hire others thus fell outside the scope of the legislation, for what they sold to their employers could not, by definition, be equated with their personal labour. In *Riley v Warden* 1848 Rolfe B put this as follows: '[the Act] applies to those who receive wages as the price of their labour....and so does not include wages which are the price of a contract.'¹⁵¹ The purpose of the legislation, he suggested, was to afford protection to a class of persons 'not very able to protect themselves' and as such, those who 'earn their bread by the sweat of their brow.'¹⁵² It was only in 'exceptional circumstances' therefore, that the law would 'interfere to prevent persons...from contracting in any way they think proper.' The only reason for departing from such a principle here was that 'in some trades, leaving the parties with an unfettered right to contract in respect of labour is replete with mischief.'¹⁵³

The problem, however, was that it proved difficult to distinguish in practice those that sold labour from those that sold a finished article - particularly in a context in which piece-rate payment and sub-contracting were common. Erle J attempted to clarify the distinction as follows, suggesting that labourers or workmen were those 'engaged in the performance of the work...personally labouring...[such] that the wages are thereby legally his against...his employer.'¹⁵⁴ The requirement that the individual have contracted to provide personal labour, rather than a particular result or task, was gradually being seen as the test to be invoked to determine the scope of the Acts.¹⁵⁵ This began as a factual enquiry that depended on a broad consideration of the worker's socio-economic status, but over time, as this proved difficult to

¹⁵⁰ See the test proposed by Pollock CB in *Sleeman v Barrett* (1864) 159 E.R. 386.

¹⁵¹ *Riley* at [69].

¹⁵² *Riley* at [68].

¹⁵³ *Sharman*, per Maule J at [176].

¹⁵⁴ *Ingram v Barnes* (1857) 119 E.R. 1190.

¹⁵⁵ See: *Sleeman*; *Sharman*; *Riley*; *Ingram*; *Squire v Midland Lace Co.* [1905] 2 K.B. 448.

apply, it hardened into a much more mechanistic test that focussed entirely on the express terms of the contract. In *Ingram v Barnes* 1857, therefore, it was said to turn on ‘whether the workman who did work with his own hands in performance of the contract was absolutely bound by the terms of the contract so to do.’¹⁵⁶

Dissatisfaction with this position was such, however, that in 1905 the court expressed regret at having to dismiss a worker’s case

‘...having regard to the facts disclosed...as to the nature of the employment and the position of the women clippers, who, though they do sometimes employ assistants, are evidently, *as a class*, wage-earning manual labourers, and not “contractors” in the ordinary and popular sense, or persons who “speculate on the state of the labour market; and we venture to express the hope that some amendment of the law may be made so as to extend the protection of the Truck Act to a class of workpeople practically indistinguishable from those already within its provisions.’¹⁵⁷

The formalistic approach that the courts adopted to the question of personal labour was in part a result of the courts’ hostility towards an Act that they saw as an illegitimate interference in freedom of contract, particularly at a time when the combination laws had been repealed on exactly that basis.¹⁵⁸ Nonetheless, many of the judges expressed much unease with the under-inclusiveness of the test, and it seems that the test was being used primarily out of a perceived necessity, to facilitate decision-making consistency in relation to a complex factual question, at the expense, however, of frustrating the broader purpose of the Act.¹⁵⁹

However (in)effective the Truck Act(s) proved in practice, they nonetheless reflect an important juncture in the history of the wage; a period during which its distinctiveness as a payment for a particular type of commodity was being established. Ideas of service had been

¹⁵⁶ *Ingram*, 124 per Campbell CJ.

¹⁵⁷ *Squire*, 454.

¹⁵⁸ See particularly: *Archer*, 83 Per Bramwell B and *Ingram*, per Campbell CJ.

¹⁵⁹ See: *Squire*, and *Ingram*, per Erle J.

firmly shed by this time, such that the principles applicable to wage claims more closely resembled claims in the sale of goods context than they did long-term relational contracts envisaging ongoing mutual obligations. In terms of their basic rationale, moreover, they reflected what was a growing recognition that where the sale of labour is concerned, the legal system cannot confine itself to passively enforcing the terms of ‘free’ agreements. Instead, there is an important role for labour law to play in providing the conditions for that freedom to emerge. Thus, while claims for wages appeared in the common law as simple contractual claims for service rendered, or goods sold, the contract by which labour was sold was beginning to be afforded specific statutory protection, modifying how such common-law rules would take effect.

3.5 Sweated Labour and the Road Towards the Minimum Wage

3.5.1 Sweating and the Sweated Trades

The Truck Acts did little to directly address the growing problem of ‘sweating,’ low-wage, insecure employment in degrading conditions. Despite being one of the more pressing social problems of the 19th century, it was only towards the end of the century that sweated labour really caught policy-makers’ attention. A series of industry-specific inquiries throughout the early 19th century notwithstanding, Parliament’s energies during this period had focussed primarily on measures to limit the abuse of child labour. Little time was spent discussing the terms and conditions of the growing number of adult workers forced to subsist on chronically low wages.

By the 1880s, however, following a series of reforms to Parliament giving working men more political weight nationally, sweating was ‘rediscovered.’ Two Board of Trade reports in 1887 and 1888 helped raise the profile of the sweated workers, although even these were followed by a further period of inaction, the Board concluding that: ‘public attention and public judg-

ment can effectively check operations in which little regard is shown for workpeople and to the quality of production'.¹⁶⁰

In the early 1890s, however, public interest in the problem increased, particularly in light of the 1893-4 report of the Royal Commission on labour.¹⁶¹ This Report suggested that the problem could not be addressed by merely tightening up existing mechanisms concerning sanitation in factories and workshops. The problem was ultimately one of 'the payment of wages insufficient for the full maintenance, under healthy conditions, of the workers and their families.'¹⁶² the lack, in other words, of a subsistence wage.

Despite characterising the problem in this way, economic orthodoxy was such that it came to be conceived not as an inherent feature of unregulated labour markets, but a failure of the market to reproduce the conditions for its own free operation. It was the workers' failure to self-organise, therefore, to equalise their bargaining positions with those of their employers, that lay at the heart of the problem - a diagnosis that shifted the emphasis away from calls for a statutory minimum wage onto how to foster collective bargaining.

Partly in response to these concerns, in 1891 Parliament enacted the first Fair Wages Resolution, committing the government to paying 'current rates' to its contractors. The Resolution provided no cause of action to victims of low-pay, and had as its principal concern securing fair competition between government contractors.¹⁶³ The Resolution invoked the term 'current rates' as the benchmark for what was 'fair,' and replaced this with 'union rates' in 1909.¹⁶⁴ The assumption behind the provision was that there existed an objective market wage that emerged spontaneously in normal conditions, and that, with the assistance of representatives from the industries concerned, this could be identified and enforced. By implication, therefore, the wage was not legally constituted, something that could be legislated for by reference to considerations such as the cost of living, but was simply legally guaranteed, its content 'mimicking' the market:

¹⁶⁰ Great Britain, Parliament 1888, vol. XVII, p.301 para. 204.

¹⁶¹ Royal Commission 1894.

¹⁶² Webb and Webb 1897, 2:xli; Great Britain, Parliament, 1888, vol. XVII, p.301 para. 204.

¹⁶³ Kahn-Freund 1949.

¹⁶⁴ For a background to the changes made to the resolution, see: Bercusson 1975.

'...it was not proposed in the Resolution...that the intention of the Resolution was to stereotype in every case as the rate of wages *current in the market* the rates which Trades Unions might desire. All we undertook to do was to ascertain what was actually agreed upon between the employers and the workmen in each trade, and, so far as we could, to see that that rate of payment was adopted.'¹⁶⁵

In effect, the Resolution made provision for the payment of a 'monopsony' wage, equating 'fair' wages with the wage that would have been agreed had organisation been present and the parties capable of acting freely. The Resolution was not, therefore, designed to provide workers with a legal right to fair or subsistence pay. Its purpose was to guarantee that the real market-price would actually be paid, that the government pay 'not more, nor less, than the current market rate.'¹⁶⁶

Interest in sweating grew in the early years of the 20th century. In 1906, the *Daily News* agreed to finance a sweated industries exhibition, the outcome of which was to raise the profile of the sweated worker and highlight how widespread and pervasive the problem really was. The exhibition revealed that sweating was not confined to a small number of sweated trades but was to be found to a greater or lesser extent in almost every occupation - affecting skilled and unskilled alike.¹⁶⁷ In light of this, and the public outcry it caused, Parliament felt it had no choice but to take more decisive action.

In 1907 and 1908 the government established an all-party committee which recommended that wage-fixing boards, based loosely on the boards established in Victoria, Australia, be established in each of the sweated trades. Rather than legislate for a statutory minimum wage, therefore, the Act envisaged the setting up of Trade Boards in the sweated trades where col-

¹⁶⁵ HC Deb 10 February 1892 vol 1 cc119-57, at 128, per Mr Plunkett. See also 130-131, per Mr Buxton.

¹⁶⁶ HC Deb 10 February 1892 vol 1 cc119-57, at 12, per Mr Plunkett. See also 130-132, per Mr Buxton.

¹⁶⁷ Blackburn 2002, 38.

lective organisation had either failed or broken down. The Boards would then be able to set minimum time and piece-rates for the trades concerned.

The premise behind the Act was that: while ‘normally, [the organisation of labour] is quite adequate to ensure, by the dealing of the market, fair play as between employer and employed’¹⁶⁸ in conditions of extreme competition, these normal principles did not apply. The parties were left so weak and defenceless that they could not be assumed to be capable of acting freely in defence of their interests. Trade Boards could thus be justified on the same basis as factory legislation targeting women and children. In the absence of collective organisation and in light of extreme competition, in these industries there was no market in the ordinary meaning of the word; the Boards were not even exceptions to the principle of non-intervention:

‘[The Trade Board Bill] not deal with the question whether State action can, or ought, to control wages. The general rates of wages throughout the country will be settled by other means than this Bill—that is by economic forces. It is generally accepted that State interference with the remuneration for labour can only be justified in exceptional cases where two fundamental conditions are absent—I mean the mobility of labour in its true sense and effective organisation.... applied exclusively to exceptionally unhealthy patches of the body politic where the development has been arrested in spite of the growth of the rest of the organism.’¹⁶⁹

Despite consensus on the need for the Act, the debates surrounding its enactment reveal conflicting views on the nature of law and its relationship with the market. Opposition to the Act had been based primarily on the fear that minimum rates would necessarily raise prices and/or unemployment. Mr Tennant argued, however, that such a view was too simplistic. The Trade Boards Act might actually *change* the incentives of the parties in such a way that

¹⁶⁸ HC Deb 28 April 1909 vol 4 cc342-411, 345, per Mr Lyttleton.

¹⁶⁹ HC Deb 28 April 1909 vol 4 cc342-411, see 344, per Mr Tennant.

‘they may...have a chance to make arrangements by which they will be able to avoid some of the very violent competition which they now wage against each other, and they may be able to effect considerable economy.... [Furthermore] ...there are certain profits of the middleman—exorbitant profits, as some of us think—which will disappear. Trade boards in their establishment will bring together not only the workpeople but the employers... It is ridiculous to assume that a rise in wages must bring about an increase in price....’

Even if this were so, however...

‘it would be better that the worker should be employed on a lesser demand, with reasonable hours of work at a fair rate of wages, than on a great demand with long hours at sweated rates of wages.’¹⁷⁰

The debates reveal, therefore, a tension between the idea that naturally free parties ought not be deprived of that freedom by circumstances beyond their control, such as unfair competitive practices and employer abuse of power, and the idea that certain institutional preconditions would have to be in place before that freedom could even emerge. In the latter case, there was far more room for law to shape the content of the wage, rather than simply shore-up the mechanisms by which it was to be enforced. It was not clear, therefore, whether law was to be seen as a constituting element in the formation of markets, or simply as a corrective mechanism in a pre-constituted and self-reproducing competitive system. Either way, there was now consensus at least on the premise that the market could not operate entirely independently from state support.

¹⁷⁰ HC Deb 28 April 1909 vol 4 cc342-411, see 346-7, per Mr Tennant.

In the end, the Trade Board Act came to reflect many of the same assumptions that had underpinned the Fair Wages Resolutions. It rejected any active role for the law in shaping the content of the wage. Direct state regulation of wages was still off the table and the role of the Boards was simply to identify the true wage that would have been agreed had self-organisation not failed. For this reason, the Boards were only to be established in trades where collective organisation was absent, and wages were 'exceptionally low as compared with that in other employments...'¹⁷¹

The Boards were confined to setting minimum rates. Their powers did not extend, therefore, to providing a minimum amount of work or minimum income from employment.¹⁷² They were simply tasked with setting minimum rates for time and piece work by reference to the going rate in the industry in question. The wage was still something that emerged spontaneously from the forces of supply and demand, therefore, but it was now assumed that in the presence of market imperfections the parties might need assistance when it came to identifying the 'true' price of labour.¹⁷³

In this sense, the Acts were simply to 'give statutory sanction to principles and methods adopted in numberless cases by voluntary agreement.'¹⁷⁴ Their principal purpose was to prevent employers from gaining a competitive advantage by paying less than the true market-price, while at the same time preventing the 'weak and defenceless' from undercutting each other to the detriment of the trade.¹⁷⁵ The Acts were as much designed to protect 'good employers' from unfair competitive practices, therefore, as they were the victims of chronically low wages.¹⁷⁶

¹⁷¹ 9 Edward VII c. 22, s. 1(2).

¹⁷² Only in 1918 was this extended to minimum piece-time rates and rates for time spent at the workplace waiting for work: 8 & 9 George V c. 32.

¹⁷³ HC Deb 28 April 1909 vol 4 cc342-411, 391, per Mr Churchill, referring to the setting of minimum rates of wages that 'has got sufficient backing in the trade to render enforcement of it by prosecution a useful and effective process.'

¹⁷⁴ HC Deb 28 April 1909 vol 4 cc342-411, 350, per Mr Tennant.

¹⁷⁵ HL Deb 30 August 1909 vol 2 cc974-1016, 1007, per The Earl of Crewe: 'The idea, therefore, is not so much to raise the standard of wage as to fix a minimum wage, raising the price paid by the bad employer to the level of that paid by the good employer.'

¹⁷⁶ HC Deb 04 November 1948 vol 457 cc1031-69, 1031, per Mr Isaacs.

3.5.2 The Road Towards the Minimum Wage

The Trade Board Acts had been premised on a particular model of industrial employment, one that continued to associate the wage-earner with someone selling his commodity in the market.¹⁷⁷ For this reason, questions of personal scope turned on the nature of the good produced, rather than the form of the contract by which it was provided. The 1909 Act thus provided that any ‘shopkeeper, dealer, or trader, who by way of trade makes any arrangement... with any worker in pursuance of which the worker performs any work’ was to be classed as the worker’s employer, and any ‘remuneration’ paid in respect of the good produced, his wages.¹⁷⁸ In effect, the legislation provided for a mandatory minimum price for a particular commodity, failure to pay which rendered the buyer liable for summary conviction. It did not, therefore, give rise to any implied contractual right to be paid minimum wages for labour provided in the context of a long-term relationship where it was presumed that it would be provided on an ongoing basis.¹⁷⁹

The first minimum wage legislation to depart from this model was the Coal Mines (Minimum Wage) Act 1912. This was enacted in response to the national miners’ strike of 1912, an attempt by miners to secure a legislative minimum wage following attempts by colliery owners to disregard district settlements and ‘break their contracts’ in response to foreign competition.¹⁸⁰ Rather than providing a mechanism for setting minimum prices for coal, punishable by way of fine or imprisonment, the legislation provided that it was to be an implied term of every ‘contract for the employment of workman underground in a coal mine’ that the employer will pay the workman wages no less than the minimum rate (set by the Board). For the first time, therefore, a form of minimum wage legislation had been enacted that provided a contractual remedy in the event of non-payment.¹⁸¹

¹⁷⁷ The courts stressed that the notion of ‘trade’ was intended to be read in this way, in: *Skinner v Jack Breach Ltd* [1927] 2 K.B. 220, 246, Per Lord Hewart CJ.

¹⁷⁸ Section 9(1).

¹⁷⁹ Instead, by section 6(5), any agreement in which a lower rate was agreed would be void in its entirety.

¹⁸⁰ HC Deb 19 March 1912 vol 35 cc1794-7; HC Deb 19 March 1912 vol 35 cc1723-93, per Mr Cory.

¹⁸¹ 2&3 George V c.2. S 1(1).

Prior to the 1872 Mines Act, coal-mining had been characterised by extensive sub-contracting. The dominant organisation was the so-called 'butty system' where colliery owners would contract with 'butty workers' to deliver coal at a certain price per ton who would hire a team of men to help them extract it from the ground.¹⁸² The key characteristic of this system was that there was a direct contractual nexus between the butty worker and the colliery company, and between the butty worker and the miners, but rarely between the miners and the owners of the colliery. For this reason, payment would flow between colliery owner and butty worker, but not between colliery owner and miner. Instead, the miner would be paid directly by the butty worker who would reserve himself the lion's share of his takings.¹⁸³ For this reason, this was an industry to which the truck-system had long been endemic.

By the end of the century, however, direct employment had become more common, with colliery owners preferring to employ both colliers and fillers directly, allocating a collier and a number of fillers to a sett, and paying the collier for the sett's produce, leaving him to divvy up the sum between the fillers.¹⁸⁴ The Trade Board model was quite ill-suited to this context, therefore, premised as it was on a simple exchange transaction where the wage appeared as the price of a finished article (or component part) for which an individual worker, or his 'personal labour' was responsible. Here, employers paid a single worker in respect of the output of a group. If minimum wage legislation was to be effective, therefore, it would have to concentrate on what the individual worker received, identifying a single party to be held responsible for guaranteeing that he actually received it in practice. To this a 'contract for employment,' a bilateral relationship between two parties, was particularly appropriate as the legal foundation for the obligation to pay a minimum rate.

In the debates surrounding the passage of the Act, Parliament discussed how a minimum wage that focussed on what the worker received might shape employer practices in a way that would be beneficial to the industry, and thus to the country:

¹⁸² On the nature and decline of the butty system, see: A. Taylor 1960.

¹⁸³ Richardson and Nicholls 2011, 158.

¹⁸⁴ See, for example, the facts of *Richards v Wrexham* [1914] 2 K.B. 497 (below).

'If you have those two things—if you have guaranteed, upon the one hand, a reasonable minimum wage, and, upon the other hand, proper conditions for efficiency and regularity of work, you have a twofold incentive to the productiveness of the industry. Why do I say that? On the one hand, in the minimum wage you have an incentive to the management to give to the individual miner, and, indeed, to all the persons employed underground, the fullest facilities to make the most of their time and of their energy, and, on the other hand, adequate safeguards to the employer and an incentive to the men not to take advantage of their slackness or default.'¹⁸⁵

It was in light of this that the Act provided that 'it is to be a statutory term of every contract for the employment of workmen underground in a coal mine, that the employer shall pay to that working man wages of not less than the minimum rate settled under the Act and applicable to that workman...'¹⁸⁶ so that the workmen would be provided with 'a right to recover by civil proceedings from the owner *who employs him* wages not less than that of the minimum rate'¹⁸⁷

The first case to discuss the significance of the term 'contract for employment' as it appeared in the Act was *Richards v Wrexham* 1914.¹⁸⁸ Here, the claimant was a filler employed in the defendant's colliery. He had been engaged by the colliery manager with whom he had signed a document headed 'Terms of Employment' binding himself to observe the regulations of the colliery and providing the colliery with a right to dismiss him. The colliery would then supply a collier working in a sett with coal, and one or more fillers to work under his direction. Each week, the colliery company paid one collier per sett by reference to the weight of the coal produced and the collier paid the filler a daily wage from this sum. There was no express undertaking by the colliery company to pay the filler any wages, therefore, nor was he in direct receipt of the product of the worker's 'personal labour.' It was thus difficult to identify any (pre-existing) liability to pay.

¹⁸⁵ HC Deb 19 March 1912 vol 35 cc1723-93, 1728, per Mr Cory.

¹⁸⁶ Section 1.

¹⁸⁷ HC Deb 19 March 1912 vol 35 cc1723-93, 1728, per Mr Cory.

¹⁸⁸ *Richards*.

In the Court of Appeal, the majority argued that the filler stood in a relation of master and servant with the colliery. Nonetheless, it held that there was no 'contract for employment *at wages*' between them and so nothing to which the minimum rate could attach:

'The question is not whether the defendants employed the filler in the sense that they selected him, and could discharge him and control him in his conduct in the mine and so on, but whether the contract between the defendants and the filler was one under which the former became by promise enforceable in law liable to pay the latter wages.'¹⁸⁹

Proof that the employer enjoyed the benefit of the worker's service did not imply an obligation to pay monetary wages for labour, where the direct recipient of that labour was the collier rather than the colliery. The wage was, in other words, a payment not for service, but for a tangible product. The existence of the master and servant relationship was thus insufficient to ground the right to minimum *wages* envisaged by the Act.¹⁹⁰

Viscount Haldane disagreed with this conclusion. He argued that 'the effect of the [Act] is to make the company the masters who are bound to pay the minimum to the fillers, and a larger sum if they have agreed to pay such larger sum through their agents the colliers.'¹⁹¹ The colliery company stood in the position of employer, because it was the company that claimed the coal, and it was the company that enjoyed the power to engage and dismiss.¹⁹² The colliery was the beneficiary of the worker's personal service, therefore, and there could be implied from this a right to contractual *wages* at the minimum rate. This was particularly so when the wage was itself linked with a contract 'for employment'. The custom that the colliers be responsible for paying the fillers was irrelevant, therefore, for the obligation to pay wages attached to the recipient of service, and a contractual obligation to pay the minimum rate could be implied by the courts once the existence of that service relationship had been proven.

¹⁸⁹ *Richards*, 516-17.

¹⁹⁰ *Richards*, 520.

¹⁹¹ *Richards*, 513.

¹⁹² *Richards*, 510-11.

When the issue reached the House of Lords it was Viscount Haldane's view that was preferred.¹⁹³ Building upon Viscount Haldane's observations, Earl Loreburn emphasised that:

'The payment of wages may be an element in deciding whether the relation of employer and workman exists or not, but if upon the facts of the case it appears that the relation does exist, then in my opinion it signifies nothing whether the wages are paid direct or whether there is some other indirect method or machinery for paying them. If that were not so the whole Act might be evaded simply by providing such machinery'¹⁹⁴

Lord Atkinson endorsed this approach in *Churm v Dalton Main Collieries* 1916, criticising *Richards* on the basis that, had it been correctly decided, the effect would have been that

'however completely the contract may establish the relation of master and servant, or employer and employee, between the owner of a colliery and his workman underground, the latter is, as against the colliery owner, excluded from the benefit of the Act unless the obligation to pay the workman wages is imposed by this contract upon the colliery owner.... in effect, that all the statute does is to fix a minimum for the wages contracted by an employer to be paid to his workman.'¹⁹⁵

Lord Shaw emphasised that the contractual obligation to pay the minimum wage was an implied obligation that attached to the relationship of master and servant, and so could not be waived by the contract:

¹⁹³ *Hooley v Butterly Company* [1916] 2 A.C 63.

¹⁹⁴ *Hooley*, 72.

¹⁹⁵ *Churm v Dalton* [1916] 1 A.C. 612, 624.

'The statute does not say that the implied term is only to enter a contract if the employer has already under it become bound to pay some wages, or to pay individual wages, to each individual workman. It would be a strange answer to this absolute obligation to pay a minimum wage to his servant that the employer should say "This statute cannot apply to me because I have done better than give him less than the minimum wage: I have bargained to give him no wages at all."'”¹⁹⁶

The courts had thus identified the wage as something that existed independently from the terms agreed as part of a 'free' bargain. It was instead a legal obligation to pay that arose as a matter of law if a service relationship could be proven. If such a relationship existed, the courts would thus imply a contract for employment at wages in order not to frustrate the purpose of the Act. This purpose, it seemed, was to shape the social reality of employment in such a way as to secure workers a 'reasonable' wage and in the process, promote greater efficiency in the industry.¹⁹⁷

¹⁹⁶ *Churm*, 634. See also Lord Parker, 643.

¹⁹⁷ HC Deb 19 March 1912 vol 35 cc1723-93, 1728 – 30, per Mr Cory.

3.6 Conclusion

Prior to the 18th century, there was implied in the exclusive nature of the employer's property in his worker's service, certain mutual obligations that helped to balance the interests of the employer with those of the worker and the community. In effect, this provided a form of subsistence wage that placed the social costs of employment on the employer. Thus, while the wage was a payment due for service, implicit in the obligation to pay was a parallel obligation to bear the costs of the worker's subsistence. By making sustainable the growing market in leases and the land enclosures that were to result, this had been an essential part of the way in which labour law provided the conditions for the emergence of the labour market.

By the end of the 18th century, the wage was emerging as the price of a commodity that was sold in a market setting. Like all prices, it was deemed to be set entirely by the laws of supply and demand, and so came to express the limit of what the employer could be required to pay for labour. The result of this was that the contract itself, rather than the relationship to which it gave rise, came to be seen as the primary source of the parties' legal rights and obligations. This left little room to read-in to the wage an implied obligation to provide for the worker's subsistence. In this way, this new conception of the wage expressed a fundamental shift in law's ontological status. Rather than being seen as a central element in the distribution of important social resources, an integral part of the process of social reproduction, the view of the legal system we find implied in labour law discourse was one of an exogenous support for a pre-constituted market system, 'safeguarding' natural property rights and passively enforcing the terms of 'free' agreements.

These developments led to a fundamental shift in the way in which the service relation was conceived. Rather than something that purchased rights to ongoing service, the wage was now a payment made in exchange for rights of ownership in a disposable commodity. To secure the worker's co-operation in production, therefore, employers relied increasingly on extra-contractual mechanisms, such as fines and truck-payments, which the legal system reinforced with criminal sanctions for contract breach and restrictions on combination. Because

labour now appeared in law as an *alienable* commodity, proprietary control over workers was preserved *in practice*, but had been decoupled from the mutual obligations of maintenance and protection they had once implied.

The ontological premises upon which decades of free trade and unregulated markets were based soon proved to be unsustainable. This is evidenced in the emergence of sweating, low productivity and the problems of low and insecure pay that came to plague policy-makers throughout the 19th century. The longer-term effect of this, however, was to provide room for new ideas about the nature of the wage, and its relationship with the market, to emerge. The wage was still something that was ‘produced’ by the market, but it was now assumed that that would be so only if certain institutional preconditions were met. The potential for the market to destroy the foundations for its own existence had thus been recognised, leaving greater room for corrective mechanisms to be introduced.

In line with this, the wage emerged during this period as the objective sum that the parties *would* have agreed had they been capable of acting freely. By the early 20th century, it was widely believed that this could only be presumed if collective labour organisations and basic minimum conditions of employment were legally guaranteed. Less clear, however, was the role that law could and *should* play when it came to guaranteeing that those conditions were in place. The late 19th and early 20th centuries reflect a period of institutional learning as Parliament and the courts began experimenting with different ways to use law to shape market outcomes, and thus to change the social reality of employment. Nonetheless, for the most part, an active constituting role for law had been rejected. The consensus was still that there were certain fundamental economic laws that had to be observed if the market was to function such that the abstract idea of a pre-constituted market continued to circumscribe the scope for legal intervention in the setting of wages.

At the turn of the 20th century, the differentiation of the legal and economic systems was incomplete. The emergence of the market had been such as to erode the autonomy of the legal system's more abstract concepts, making it difficult for the system to recognise, and bridge, the gap between the market's assumptions about reality, and the conditions that must exist to

sustain them. The legal system's conception of the employer's obligation to pay had not yet differentiated itself from the way the wage appeared from the internal perspective of the market. The most the legal system could do, therefore, was to guarantee that employers actually paid the objective market wage, the exchange value of labour, rather than requiring expressly that he cover the costs of subsistence.

Despite this, it is clear that new ideas were emerging. The Coal Mines Act and the model of minimum wage regulation it reflected are clear evidence of this. By focussing more on what a worker received in exchange for *employment* than on what an employer paid for labour, Parliament and the courts had attempted to embrace law's capacity to shape social practices and influence the parties' incentives. In this sense, it may be that this period reflects the beginning of a shift in the way in which law's ontological status was being conceived, and, potentially, in the form and function of the wage.

The next chapter will explore the significance of these subtle changes by analysing in more depth the relationship between wages, salaries and remuneration, showing how the differentiation between them came to shape how minimum wage legislation evolved.

CHAPTER FOUR

The Minimum Wage and the Right to Subsistence: The Wages Councils Model

4. Introduction

This chapter traces the development of minimum wage legislation through the early-mid 20th century. It shows that what began as a basic mechanism for regulating the price at which commodities were sold in the market, securing fair competition between employers, gradually transformed into a legal mechanism designed to secure workers a form of 'subsistence wage.' This, it shows, took the form, not of a minimum rate for labour, but of a guaranteed minimum income from employment. The move to a subsistence model of the wage was part of a wider acceptance by courts and legislatures of an executory, or relational, model of the contract of employment, in which there was an implied right to be remunerated for time spent in employment. Linked to this was the idea, also increasingly expressed in juridical language, that the law actively constituted the employment relation.

To explore these ideas, section one traces the emergence of the concept of remuneration from its origin in the concept of the salary to its modern form as a contractual payment for employment. Section two builds on this analysis by exploring the link between these ideas and the emerging relational model of the contract of employment throughout the 20th century. Section three then shows how these changes influenced the way in which minimum wage legislation came to be conceived, exploring the distinctive ontological assumptions upon which the Wages Council system was based. It then draws some conclusions about what this tells us about law's ontological status.

4.1 Salaries, Remuneration and Early 20th Century Minimum Wage Regulation

4.1.1 Salaries and Remuneration

The term salary had historically been used to refer to periodical payments made to office-holders for tenure of an office.¹ Office-holders were treated as enjoying property in their office, and the salary seen as a form of rent payable to them as its holder.² Issuing from the office itself, the payment did not vary in accordance with what services were actually being performed and, in many ways, resembled the pre-industrial servant's right to maintenance. Like the latter, the salary was effectively a payment for tenure, set at the level required to uphold the dignity and guarantee the performance of the duties of the office.³ For this reason, it was payable irrespective of whether actual service was required, because 'it is fit that a public servant should retain the means of a decent subsistence without being exposed to the temptation of poverty.'⁴

The term itself is said to have its origins in 'salt money,' a payment made to army officials during their service. The 'salary' consisted of meat and drink, of which salt was deemed to be a necessary part.⁵ It was paid from a 'salt fund', the availability of which was unconditionally guaranteed, necessary to keep the army going throughout their service.⁶ Given the difficulties of transporting large quantities of salt, however, these salt payments were gradually replaced by fixed unconditional money payments, the intention being that the soldiers could then acquire the salt themselves.

¹ From around 1390 to 1520 commonly applied to the stipend of a priest, esp. a chantry priest: 'Salary, N.' 2017.

² Holdsworth 1922, vii 269; Matthews 1982.

³ *Wells v Foster* (1841) 151 ER 987; 8 Meeson & Welsby 149, at 152. Similar views are expressed in *Liverpool Corporation v Wright* (1858) 70 ER 461; (1859) John. 359, 369 referring to the fees paid in place of a salary. For a discussion of the types of payments and types of office which are deemed to be unconditional and unassignable, see: *Davis v Duke of Marlborough* (1813) 36 ER 303.

⁴ *Wells*, 152. See also in relation to Emoluments: *Flarty v Odium* (1790) 100 ER 801; 3 TR 681.

⁵ Rokade 2016; Latin *salārium*, originally money allowed to Roman soldiers for the purchase of salt, hence, their pay; subst. use of neuter singular of *salārius* pertaining to salt: 'Salary, N.' 2017.

⁶ Warner and Warner 1602, 360: 'For competent viande and sallarie to vndergoe the defense of the Realme.'

In time, the salary emerged in legal discourse as a regular and unconditional payment for the occupation of some position or office, set at a level that reflected the demands of the office and the office-holder's position and status, the payment of which presupposed an ongoing obligation to provide faithful service.⁷

During the nineteenth century, it became increasingly common for independent professionals to join together to provide their services as a partnership or a small, owner-run firm.⁸ The partnership or firm would then pay them and a number of clerks and/or agents a fixed annual sum that was independent from the fees paid by clients. By these means, there emerged a class of relatively well-to-do professional men in receipt of a stable income, occupying a position or post that imposed upon them an obligation to serve. By analogy, these payments came to be classed as salaries, the obligation to pay which lay with the partnership or company in whose name these persons carried on their profession.

It was the salary's certain and unconditional nature that came to distinguish it from other payments made in relation to work, or service. For this reason, it excluded payments to the genuinely 'self-employed', sums 'which a man earns in exercise of his personal skill' where he himself takes the economic risk.⁹ It was confined instead to fixed payments for service, whether in consequence of the occupation of a public office, or the occupation of a post pursuant to a contract of employment.¹⁰ The courts argued that the extension of the term to cover the latter was justified because the contract supplied the certainty that is characteristic of the salary, which for office-holders had been provided by their tenure.¹¹

Towards the end of the 19th century, the salary was expressly defined as a payment for services rendered under some contract or appointment, computed by time and payable at fixed

⁷ Denning 1939.

⁸ Marshall 1939.

⁹ In *Re Hutton* (1844) 14 QB 301, 309 per Lindley J.

¹⁰ In its earlier sense: 'Salarie...signifies a recompence or consideration given unto any man for his paines bestowed upon another mans' Rastell and Rastell 1641, fn.245.

¹¹ *Re Shine* [1892] 1 QB 522, 527.

intervals.¹² Here, the term 'services rendered' did not mean a person's 'actually being called upon to perform duties' but his being 'under an obligation to perform them.'¹³ Recipients of salaries might include 'medical advisers, members of theatrical establishments, and even ... some descriptions of household servants' therefore, as persons hired to serve, and paid for the fact that they are under an ongoing legal obligation to perform the services required of them, irrespective of whether or not they actually work.¹⁴ This obligation might be based in contract, therefore, or as for office-holders and servants, some property relationship or tenure.

These ideas are reflected in the modern dictionary definition which defines the salary as a 'fixed payment paid periodically to a person as compensation for regular work.'¹⁵ This definition has been frequently invoked by the courts, and also underpins the definition of 'salaried work' in the National Minimum Wage Regulations (NMWR 1999 and NMWR 2015).¹⁶ It is to be contrasted with the 'wage', in its specific juridical sense, that is, a payment for actual services rendered, most particularly for manual labour, or a payment that corresponds with the provision of some concrete good or measurable output, title to which the employer enjoys by virtue of a contract of exchange.¹⁷ From this perspective, only the wage can be seen as a price dictated by the market, for the salary has long been seen as an unconditional, mostly contractual, payment set by reference to the skill and status of the individual, and what is needed to sustain it. This would be an individualised payment, therefore, rather than one based on the prevailing, or going rate.

The term remuneration was rarely used prior to the 16th century, and even then, only in a generic sense to refer to that which was given as recompense for some benefit provided. The term developed a more technical meaning, however, to refer to the various benefits payable to holders of higher status positions, such as crown-servants, public inspectors, judges or mem-

¹² *Re Shine*, per Lord Fry.

¹³ *Emmens v Elderton* (1853) 138 E.R. 1292; 13 CB 495, 668.

¹⁴ *Emmens* 668.

¹⁵ OED 2nd Ed, 1989.

¹⁶ Reg. 21. The dictionary definition has been invoked in: *Greater London Council v Minister of Social Security* [1971] 2 All ER 285; 1 WLR 641, 646.

¹⁷ *Resolute Management Services Limited v The Commissioners for Her Majesty's Revenue and Customs* 2008 WL 3996453; *Greater London; Re Shine*.

bers of the military, in recompense for their service.¹⁸ This would often include a salary, the definite monetary payment made for ongoing service, but also various non-monetary benefits and/or supplementary payments that might only be payable on the performance of specific tasks or duties.¹⁹

From the 19th century the term was used increasingly to refer to the total contractual benefits due to a private sector employee in connection with their employment.²⁰ Many higher-status employees would receive a number of benefits in addition to their salary, such as commissions on profits, or benefits in kind, such as the right to occupy a farm house or some other property linked with the business, and this would form part of the contractual remuneration that they could claim if they were wrongfully dismissed.²¹

4.1.2 The Significance of the Distinction Between Wages, Salaries and Remuneration

There was thus a considerable contrast between the rights of a contractual employee and the rights of labourers or workmen when it came to the question of payment. The right to be paid wages for labour was quite different from the unconditional right to be paid a salary for time in contracted employment, a right that accrued independently from time spent working. In relation to the latter, an employer could not withhold such sums following a breach of contract, but would have to proceed by way of an action for damages. Nor did wage-labourers or workmen enjoy the added benefit of a contractual right to remuneration (of which the salary was just a part) for there was no ongoing contractual relationship to which such rights might

¹⁸ See: Petty Sessions (Ireland) Act 1827, c. 67, s.9; Militia Pay Act 1827, c. 50, Schedule 1; Clerk of Crown in Chancery Act 1835 c. 47, preamble; Superannuation Act 1834 c. 24, s.18.

¹⁹ For an example of how this operated in practice, see: *Skailes v Blue Anchor Line* [1911] 1 KB 360, 365.

²⁰ Such as the right to occupy a house: In *Re English Joint Stock Bank v Yelland's Case* (1867) LR 4 Eq 350.

²¹ *Saunders v Jones* (1877) 7. Ch D 435.

attach. The only ongoing relationship between the parties arose from the employer's de facto right to secure himself the labour product purchased by the wage.²²

The significance of this distinction, between the types of payment that could be claimed by different categories of worker, was such that very often it was the nature of the 'remuneration' that determined the question of employment status and thus the scope of labour legislation. The contractor, it was said, looked to 'his profit' and not to wages for remuneration, whereas the workman or labourer would expect to be paid in wages.²³ If the person in question was not a workman or labourer who was paid in wages, therefore, he was someone who had to rely on his contract to secure his right to be paid - whether it be an executory contract of employment (or service), or a contract for services.

In *Gordon v Jennings* (1882), the court made explicit this distinction between the wage, on the one hand, and the salaries and contractual remuneration of higher status employees, on the other.²⁴ This case concerned the scope of the Wages Attachment Abolition Act, 1870.²⁵ Grove J suggested that although in a broad sense, the term wages might refer to 'any remuneration for services' properly construed:

'The term 'wages' is not applied to the remuneration of a high or important officer of the state or a company, for instance, but to that of domestic servants, labourers, and persons of a similar description. Taking the collocation of the word "servant" with "workman" and "labourer," it is obvious that the reasonable application of the Act is to persons of small means—to servants, such as labourers and workmen receiving small wages at short periods.'²⁶

²² Employers' right of control and entitlement to obedience arose from this general purchase of the outputs of labour for the contract's entire duration, rather than over particular working hours or for particular types of tasks: Steinfeld 1991 85-6, 147; Mummé 2016b, 186-7. Hence, in the settlement cases, workers with weekends or days off were not deemed to be hired under contracts of service. See: Chapter Three.

²³ *Marrow v Flimby and Broughton Moor Coal & Fire Brick Company* [1898] 2 QB 588, 598.

²⁴ (1882) 9 QB D 45.

²⁵ 33 & 34 Vict. c. 30.

²⁶ *Gordon*, 46.

This did not include a secretary of a company paid a salary of £200 a year by quarterly payments because

‘...his position and remuneration can [not] be said to come within the same description as those of menial servants or labourers. His salary is more than sufficient to keep life up; his salary and employment are such as many persons in the position of gentlemen are sometimes glad to get.’²⁷

Similarly, Lush J argued that the wage was a payment made to those who, absent such wages, ‘would be likely to be deprived of their daily means of subsistence.’²⁸ This did not include the defendant in *Gordon* who enjoyed a relatively comfortable annual salary, employed in a stable and senior post within the company.

By the end of the nineteenth century, the distinction between salaries, wages and the concept of remuneration was relatively clear. The wage was a payment that was payable in exchange for property in labour, or ‘labour rendered,’ identified by the fact that it was provided by persons with nothing but their labour from which to live.²⁹ The salary, by contrast, was a fixed, unconditional sum paid not for property in labour, but for service, whether provided pursuant to a contractual obligation to serve, or the occupation of an office. The term remuneration, by contrast, might be used to refer to wages and/or salaries as a form of payment received in *recompense* for some benefit, but it also had a more technical meaning in that it referred to any monetary or non-monetary benefits received in connection with employment, whether flowing from an executory contract or tenure of an office.³⁰

The distinction between wages and remuneration came to be particularly important in the context of the Workmen’s Compensation Acts (1897 to 1906). The Acts provided for compensation in the event of industrial injury, calculated by reference to ‘earnings in the em-

²⁷ *Gordon*, 46.

²⁸ *Gordon*, 47.

²⁹ *Riley*.

³⁰ The Income Tax Act (1842) 5 & 6 Vict. c. 35 was the first Act to directly invoke the term remuneration to refer to the reward ‘accruing by reason of employment.’ (Schedule E).

ployment of the same employer.³¹ They were quite explicitly protective statutes and envisaged an ongoing relationship between the parties, compensating workers for the loss suffered as a result of the fact that the relationship had been *prematurely* terminated, or disrupted, due to an accident at work. Given this, the courts drew a sharp distinction between this legislation and the Truck Acts, which 'was passed for a different purpose, and [thus] uses expressions different from those found in the statute we have now to construe.' Rather than equating the term 'earnings' with 'wages' as used in the Truck context, therefore, the court argued that 'the word "earnings" is used, not in the sense in which economical writers use it, but in a popular sense...the full sum for which the man is engaged to work.'³² This was taken to correspond with the total remuneration payable in connection with employment: anything that the workman had a legitimate expectation to receive, whether from his employer or otherwise.³³ This included sums which the courts had consistently excluded from the definition of wages under the Truck Acts. It included certain 'allowances' paid to 'meet the cost of board and lodging,' for example, said to be 'earn[ed] each time [the worker], *in the service of his employers*, has to spend the night away from home.' The courts emphasised that the term went beyond the wage because it covered the total cost to the worker of providing his service, which, in certain industries, would be far greater if 'the conditions of the employment were such that the workman had to incur some expenses to enable him to perform the services for which he was to be remunerated.'³⁴ Remuneration, or earnings, was thus to be conceived as a payment for service rendered under a contract of employment, and so was not to be confused with a wage as a payment for labour.

The term 'workman' that was employed in the Act referred to anyone engaged in any of the listed employments, irrespective of the form of the agreement. The effect of the Act was, however, to make it possible to imply a relational, executory contract so as to better protect workers' interests in employment, providing a right to remuneration that could operate along-

³¹ Workmen's Compensation Act 1897, schedule 1.

³² *Abraham*, 307-8. See also: *Great Northern Railway Company v Dawson* [1905] 1 K.B. 331.

³³ *Wild v John Brown Ltd* [1919] 1 KB 134 (not applicable on the facts). For further limits, see: *Logan v Shots Ltd*. [1919] SC 131, separating 'earnings' as a worker, and profit as a 'contractor' obtained as part of the same job.

³⁴ *Midland*, 351.

side his right to wages.³⁵ Despite the fact that protection was not tied to the existence of a relational contract of employment, therefore, the courts were beginning to extend the right to remuneration that had once been the preserve of the higher status 'contractual' employee to those hired at wages so as to better protect their interests. This was to lay the foundations for the emergence of an implied right for all those who sell their labour for wages to be provided with a contractual right to be remunerated for employment.

4.1.4 Salaries, Remuneration and Minimum Wage Regulation

Throughout the early 20th century, the courts became increasingly aware, and began to emphasise, the distinction between wages and earnings, or remuneration. Thus, if Parliament used the term 'wage' the effect of this was to severely circumscribe the scope of the statute's protection. This is particularly clear from the court's interpretation of the Metropolis Management Act 1855. Section 62 empowered local councils to 'employ such servants as may be necessary, and to allow such servants...such wages as [the Council] may think fit.' In *Roberts v Hopwood* 1925 the court had been asked to decide what considerations a Council could take into account in determining the servants' wages. Poplar Council had set a flat-rate wage for all of its servants. This meant that both male and female servants would receive the same wage regardless of output. In effect, they were appointed to a post, or office, and were entitled to be paid a salary for this purpose. The Act, however, empowered the Council to set wages, and this was seen to be a payment that varied depending upon the quantity and quality of the work. The wage, the court argued, is 'the reasonable pecuniary equivalent of the services rendered...' ³⁶ or 'the price which the employer pays to his employee for his or her services.'³⁷ The remuneration that the Council had set manifestly exceeded that which could properly be classed as wages, therefore, because they 'were far in excess of those [sums] necessary to obtain the services required and to maintain a high standard of efficiency' and so exceeded the 'market price' of labour.³⁸ This was, according to the court, something that was,

³⁵ Section 7(1). This was modified so as to provide for an added requirement that the overall remuneration not exceed £250 was added in 1923 (s.9(1)). The definition was also slightly modified in 1925, s.3(1).

³⁶ *Roberts v Hopwood* [1925] AC 578, at [612] per Lord Wrenbury.

³⁷ *Roberts*, 596, citing Bankes J, [1924] 2 K. B. 711.

³⁸ *Roberts*, 596, citing Bankes J, [1924] 2 K. B. 711.

'for any well-recognized form of labour ...ascertainable and can be ascertained.'³⁹ For this reason, sums exceeding this amount were to be classed as a gift, or a gratuity, and as such, something that the Council was not empowered to pay under the Act.⁴⁰

That Parliament had used the term 'wage' in the Trade Board Act, the first attempt to intervene with the amount that workers were paid, was thus significant in circumscribing the scope of early minimum wage legislation. In *France v James Coombe & Son* 1929, for example, this had the effect of confining the claimant's right to the minimum rate to the time spent producing the 'good' that was characteristic of the trade to which the Wages Order applied. This meant he could not claim the minimum rate for time performing quasi-managerial duties, rather than manual work:

'The Trade Board Acts was obviously a scheme to provide minimum wages for a particular class of persons employed in the trade ...as soon as this worker ceases to perform the work [described in the order] he is employed under a general agreement of service⁴¹ ...'

The majority interpreted the reference to wages in the Act as referring to the price of labour, rather than to what a worker might be entitled to receive by way of income, or remuneration, from employment. Lord Blanesburgh adopted a different view, however, and suggested that:

'[The Trade Board Act requires] that the worker shall receive at least the minimum rate of remuneration for the work actually done, *or for the time spent in statutory employment*.⁴²

He argued that the minimum rate was payable irrespective of whether the worker 'actually worked.' This was so even if he was engaged in work to which the Order did not apply, pro-

³⁹ *Roberts*, 594.

⁴⁰ *Roberts*, 600.

⁴¹ *France*, 523, per Lord Warrington of Clyffe.

⁴² *France*, 505-6.

vided the work was connected with his employment. This, he suggested, would be necessary to give effect to the Act's purpose in circumstances where the employer's rights in the worker's labour were so extensive and exclusive as to prevent him from accessing his subsistence elsewhere. It would have been different if the Act required an employer to provide a minimum amount of work. Because it didn't, however:

'...during the periods when the employer is not bound either to employ or pay him he must be left at liberty either to obtain his minimum wage from another employer, or to exercise his skill for his own benefit. In no other way can the minimum or subsistence wage which for workers of his trade the Acts essay to provide be found for him... [This required that] for *the whole time of his service* there [be] payable to the worker a wage at the minimum time-rate.⁴³

His Lordship thus read the minimum wage as a right to be paid a minimum remuneration for time spent in employment.⁴⁴ Much as had the medieval courts, he assumed that those entitled to benefit from a worker's ongoing service ought to bear the costs of maintaining the provider of that service throughout the entire term of employment.

The courts were becoming increasingly aware that Parliament's choice between the concepts of 'wage' and 'remuneration' had significant consequences for workers when it came to the scope of legislative protection. By the beginning of the 20th century, it seemed as if the term wages or rates was being invoked in legislation principally concerned with the regulation of the market, and in this context the court tended to interpret the term wage quite narrowly. The term 'remuneration', or 'salary', by contrast, tended to be invoked only in those contexts concerned more generally with employment, or the regulation of the labour relationship and/or the social costs of production, and it is these terms that are found in the National Insurance legislation, the Income Tax Act, and, as we have just seen, the Workmen's Compen-

⁴³ *France*, 506-7.

⁴⁴ This view was decisively rejected by the rest of the court, however, for it: 'ignores the clear distinction between employment for which alone the minimum wages are provided and employment in the business generally for which no such provision is made' *France*, 523 per Lord Warrington of Clyffe.

sation Acts.⁴⁵ The Coal Mines (Minimum Wage) and Agricultural Wages Acts were unique, therefore, for introducing a right to minimum *wages* that was conditional upon the existence of a contract *for* employment, or *of service*, rather than being tied to the provision of labour. This left open the question as to whether the rate was payable for service, time spent in contractual employment, or only for labour furnished as the use of the concept of the wage would suggest.

In *Pockney v Atkinson* 1930, decided under the Agricultural Wages Act 1924, the court implied from the reference to ‘wages’ a right to be paid the minimum rate *only* for time actually working.⁴⁶ Here, an agricultural worker had been hired for a year pursuant to an agreement that he would be paid a weekly sum that was higher than the minimum rate specified in the Order. The worker wrongfully left his employment before the end of the term, and sought to recover the minimum weekly rate for the period during which he had been employed. The court dismissed the claim. There was a distinction to be drawn, it argued, between an obligation to pay the minimum rate for labour actually provided, and an obligation to secure that a minimum weekly sum was actually received.⁴⁷ The purpose of minimum *wage* legislation was not to protect contractual expectations, but to prescribe the minimum price at which certain types of labour could be bought and sold, and it was into this category that the Act in question fell:

‘if the worker had served his time he would have been paid his wages, but in the present case the employer refuses to pay wages to the man because the man did not carry out his contract to serve a certain time’ ... ‘There is all the difference in the world between saying that a man shall be paid at a certain rate per week and saying that he shall be paid weekly at that rate.’⁴⁸

⁴⁵ National Insurance Act (1911), 1 & 2 Geo. V, c.55; Income Tax Act (1842) 5 & 6 Vict, c. 35.

⁴⁶ By the Agricultural Wages (Regulation) Act, (1924) 14 & 15 Geo. V c. 37, s. 7(1): ‘.... any person who employs a worker in agriculture shall, in cases to which the minimum rate is applicable, pay wages to the worker at a rate not less than the minimum rate....’

⁴⁷ *Pockney v Atkinson* [1930] 1 K.B. 197. See particularly Lord Hewart CJ, 209-10.

⁴⁸ *Pockney*, 204.

In *Seabrooke & Sons v Jones* 1929, by contrast, Hewart CJ, referring to the Act's requirement that 'In fixing minimum rates a committee shall, so far as practicable, secure for able-bodied men such wages as in the opinion of the committee are adequate,' argued that the Act had been intended to guarantee a minimum weekly income, irrespective of the amount of work available, so as to secure the 'amount of wages which would have been payable if the [week's hours] had been fifty.'⁴⁹ This interpretation took account of the fact that the power to set minimum wages was conceived in the Act as a power to fix minimum rates that are not only *adequate*, but 'enable a man in an ordinary case to maintain himself and his family in accordance with such standard of comfort as may be reasonable in relation to the nature of his occupation.'⁵⁰

In *Smart v Spencer*, however, Somerville J rejected this interpretation, for it was inconsistent with the fact that Parliament had used the term 'wage' to refer to the minimum rate.⁵¹ Clear wording would be required, he suggested, before minimum *wage* legislation could be interpreted as setting minimum rates of payment that extended beyond time spent working. It was this view that, in this context at least, appears to have prevailed.

These cases can be contrasted with *Devonald v Rosser & Sons* 1906.⁵² Here, the existence of a contractual right to notice combined with the fact that the individual occupied a position not dissimilar to that of butty workers in the coal industry - an intermediary - was taken to imply that the relationship between the parties consisted of more than a series of exchanges of work and wages, notwithstanding that he was engaged in manual work and the contract provided for payment at piece-wages.⁵³ The court argued that, there being an implied promise to employ or retain the worker, there must also be an implied obligation to provide sufficient work so as to enable him to earn a reasonable remuneration.⁵⁴ This permitted the worker to recover 'wages' for the six-week notice period during which he had been employed but deprived of work.

⁴⁹ *Seabrooke & Sons v Jones* [1929] 1 KB 335, 340.

⁵⁰ Section 2(4).

⁵¹ [1948] 2 KB 105

⁵² *Devonald v Rosser* [1906] 2 KB 728.

⁵³ The worker had been employed as a roller man in the defendant's works for 13 years at the time of the claim.

⁵⁴ *Devonald*, 731-3.

By the beginning of the 20th century, while a relatively clear distinction had emerged between the wage, a concept intrinsic to the market, and the concepts of the salary and remuneration, contractual payments due for employment, the precise relationship between them remained unclear when it came to legislation concerned directly with how much a worker was entitled to be paid. It was still the case that only in rare circumstances would the courts imply a contractual right to remuneration where the worker was engaged in manual work at relatively low wages.⁵⁵ The contractual right to be remunerated for employment remained largely the preserve of the higher status employee, those individuals capable of bargaining for such rights in their contract. The decision in *Devonald* can be explained by the worker's long-service and role within the company, and *Seabrooke* by the fact that the worker benefitted from a full-time contract of service that guaranteed at least 50 hours of work per week. Similar premises underpinned Parliament's exclusion from the National Insurance Act 1911 those 'higher paid' employees whose remuneration exceeded £160, for such persons' contracts were deemed to provide them with adequate protection.⁵⁶

Before the Second World War there was not, it seems, any significant move towards assimilating the positions of the two classes of worker, although ideas were beginning to surface which might suggest a gradual move in that direction. For the most part, the courts continued to be relatively reluctant to imply a contract of employment unless a service relation of kinds could be proven and, in the early years of the 20th century, such were rare. In many major industries, such as mining, ship-building, iron and steel; sub-contracting, and casual work, rather than direct and open-ended employment, remained the norm, and so too did the presumption that workers' right to be paid was limited to their right to wages.⁵⁷

4.2 The Contract of Employment and Minimum Remuneration

4.2.1 Socio-Historical Context

⁵⁵ For a case in which this was deemed not to apply, see: *Hulme v Ferranti* [1918] 2 K.B. 426 (refusal to imply a notice period or an obligation to provide work to a piece-worker).

⁵⁶ See the list of exemptions in National Insurance Act 1911, first schedule, part II.

⁵⁷ Deakin and Wilkinson 2005, 92-3.

Experiences during and after the First World War helped to foster the development of new ideas about the state's role in the economy. The state took a much more active role in production during this period, and this centralisation stimulated a movement towards mass-manufacture, based on a more reliable and continuous consumer demand. Production became less intermittent as a result and this helped to fuel the expansion of machine-based industry and, with developments taking place in company law, this was to lead to a more centralised, vertically integrated form of control.⁵⁸

The output rigidity inherent in this model made it more efficient to hire workers long-term and keep production going irrespective of fluctuations in the market, than it was to hire them on short-term contracts so as to respond to short-term fluctuations in demand. For this reason, wage-costs began to be seen as a kind of overhead, more akin to a salary than a wage, and in time was coming to be seen as something that purchased the right to integrate the individual within the enterprise with a view to making use of their ongoing service.⁵⁹ This process was to be given a further push in the post-1945 period with nationalisation and the rise of the large-scale public enterprise.⁶⁰

The developments taking place in the inter-war period also led to greater firm specialisation, and this helped to lay the foundations for industry and sector level collective bargaining mechanisms to develop.⁶¹ This process was helped by the fact that compulsory arbitration during the First World War had helped to convince the government of the importance of state support for the 'self-regulation' of industry. This meant, however, that assumptions about the (il)legitimacy of wage-regulation did not much change. The focus became not how to develop alternatives to the trade board model, but how to build upon it to promote joint regulation. The question of low pay remained a problem of price regulation, requiring measures to stimulate fair competition, rather than any direct intervention in the setting of wages.⁶²

⁵⁸ Dobb 1946, chapter 8; Hannah 1974.

⁵⁹ Dobb 1946, 362.

⁶⁰ Deakin and Wilkinson 2005.

⁶¹ Dobb 1946, 363.

⁶² See particularly: Ministry of Reconstruction 1918, 659, at [22].

The Second World War witnessed a sufficiently large extension of the economic functions of the state, however, as to lead to a qualitative reconsideration of the relationship between the state, the law and the market.⁶³ Full employment, a steady demand for the products of factories, the emergence of mass production techniques and a much more significant move towards vertical integration had had a significant impact on the needs and interests of the parties as well as the nature of industrial organisation. This, and the erosion of status and skill differentials that compulsory service during the war years had facilitated, meant that standardised terms and conditions could more easily become the norm. This was something that the parties were finding direct employment, on the basis of a contract envisaging mutual obligations of ongoing service and payment, was well-suited to meet.

In 1940, the government enacted the Essential Work Order with a view to guaranteeing continuous production during the war period. This effectively made labour compulsory for all, restricting employers' rights of dismissal, and helping to erode status distinctions between workers and across occupations. The effect of these measures was to provide workers of all types with a guaranteed minimum income and a regular working week, while lending trade unions a much more significant role in governing the economy.⁶⁴ In this context, the wages these workers received no longer appeared as the price of a tangible good, for they were payable for war-service, attaching to employment, rather than the provision of commodified labour. The idea behind the Order was that:

'The Minister will be able to prescribe the terms of remuneration, the hours of labour, and conditions of service. Remuneration will be on the basis of remuneration for the job. If an engineer is asked to do engineering work, he will get engineer's pay. If somebody else is asked to do a particular job, he will get the pay of that job. If a professional man is asked to do his professional work, he will get his professional pay. If

⁶³ Brodie 2003, chapter 8; Dobb 1946, 387; Deakin and Wilkinson 2005, 241-2; Kahn-Freund 1949.

⁶⁴ Gospel 1992, 155. The practice under the EWO had been to provide guaranteed weekly wages provided that workers were available for work and willing to perform reasonable alternative work.

he is asked to do manual work he will get a manual worker's pay. The general principle will be that of remuneration for the *job*.⁶⁵

During this period, all workers received remuneration for their contribution to the war-effort; their on-going service to the country.⁶⁶ They did not receive wages in the traditional sense, therefore, because 'wages and profits were under the government's control' and their pay was determined out-with the context of the market.⁶⁷

By the end of the war the state had not only exercised close control over manpower allocation, industrial production, and economic priorities, but had also taken some steps towards universal (rather than selective) social reform.⁶⁸ This made possible the creation of new jobs in an emerging consumer-service sector, while at the same time opening up the professions to new recruits to meet the growing demand for public services. In time, this helped to erode customary wage-rates and rigid controls over training, further undermining status distinctions between wage-workers and salaried employees.

4.2.2 The Contract of Employment

One of the longer-term impacts of the Second World War was to pave the way for the emergence of a unitary class of persons dependent on what was increasingly becoming stable employment for subsistence. The decline of manufacture and the growth of services, coupled with large-scale nationalisation of industry was such, moreover, that it was the model of service rather than that of industrial wage-labour which was to dominate as the common law adapted itself to these changes. Professionals no longer enjoyed the privileged protected status they had once enjoyed, therefore, but nor were wage-workers to be left entirely dependent upon their wages for subsistence. In addition to the right to be paid wages for labour, the

⁶⁵ HC Deb 22 May 1940 vol 361 cc154-85, 155 per Mr Atlee.

⁶⁶ The Emergency Powers Act (1940) required all citizens to place 'themselves, their service and their property' at the government's disposal.

⁶⁷ HC Deb 22 May 1940 vol 361 cc154-85, 156, per Mr Atlee.

⁶⁸ Brown 1982, 285. For example, free school dinners, unemployment assistance boards and emergency medical services.

growth of the welfare state and early social welfare and labour legislation was to provide for all a relatively comprehensive contractual right to be remunerated for employment.

Particularly significant in this process was the National Insurance Act 1946, bringing within a single class all those 'gainfully employed.'⁶⁹ This provided the foundations for uniting salaried employees and wage-earners within a single conceptual category, and it was the contract of service that was to be drawn upon for this purpose.⁷⁰ By these means, the road was being cleared for the development of the previously embryonic technique of constituting a relation of service grounded in the employer's economic power as an executory contract of service, something that was to re-embed in the labour relationship, the mutual obligations of service and social protection that the legal idea of 'tenure' had long implied.

The executory contractual form had been integral to the labour and social protections being developed during and after the war. But it was also essential to meeting the changing needs of the parties in production. The executory contract helped with the rationalisation and stabilisation that the large-scale corporate structures emerging during this period required. These businesses required more than property rights supported by criminal sanctions to guarantee the smooth running of the production process, while rising wage-rates and general improvements in the conditions of the working classes were such that economic power alone would be insufficient to secure the co-operation of the workforce. It seems from this that the contract of employment was only available as an appropriate platform upon which to build labour and social rights because it was already becoming central to the way in which the parties themselves sought to protect their interests and expectations. Nonetheless, in so-becoming, this further stimulated the use of this model by the parties themselves.

The emergence of the executory contractual model was significant not only for helping to stabilise industrial relations, and for facilitating the co-ordination of labour and social protections, but also because it provided the courts with the resources from which to reconstitute the labour relationship in a new form. Drawing upon the concept of the contract of service (or

⁶⁹ National Insurance Act (1946), 9 &10 Geo VI, c.67, section 1(2).

⁷⁰ National Insurance Act (1946), s. 1(2)(a). The term 'contract of employment' was not used explicitly until the Contracts of Employment Act (1963), c.49.

employment), they were able to express the property relationship at the heart of wage-labour in a form in which mutual obligations, similar to those that had once been inherent in ideas of tenure, could again be implied. Now, however, they could be implied in a form that was compatible with the assumptions of the market. Here, integration into the enterprise, rather than the master's household, acted as a functional substitute for tenure, the legal system making the corporation responsible for preserving the persons, and resources, in its 'care.' Drawing an analogy between the salaried employee's contractual obligation to faithfully serve and the pre-industrial servant's duty of obedience, each of which having presupposed a form of 'subsistence wage,' the courts had combined within a single institution subordination and dependence, and stability and protection. The courts' ability to do this, however, was inseparable from the fact that Parliament itself was beginning to draw upon the executory contract and the associated concept of remuneration, rather than the wage-work exchange, as the foundation upon which to construct a legal framework concerned with the regulation of pay.

4.2.3. The Contract of Employment and the Minimum Wage

Discussions over what might be referred to as minimum 'remuneration' legislation began in 1929 when Parliament debated the introduction of holidays with pay. Despite consensus on the importance of paid holidays, however, both from a welfare and productivity perspective, concern was expressed that a statutory right to paid holidays would distort the price of labour, forcing employers to lower basic wage-rates.⁷¹ In relation to agriculture, for example, it was argued that

‘...the principle of those boards is to regulate wages at the highest level which, in the opinion of the boards, the industry is in a position to pay. If you are going to impose an additional burden on agriculture, it must necessarily be taken into account by the agricultural wages boards when they are next called upon to fix the wages of the agricultural worker, and it would, therefore, almost necessarily have the result that the

⁷¹ HC Deb 15 November 1929 vol 231 cc2421-503, e.g. at 2449 per Mr Somerville.

wages would be fixed at a lower level because of the increased charges which were being placed on agriculture by this Bill.⁷²

Throughout the course of the debates, it was the term wages, rather than remuneration that was invoked when discussing the costs of paid holidays. Paid holidays were not yet seen as part of the contractual remuneration payable for employment, therefore, but a charge or cost that affected the value of the labour purchased by the wage. Providing for paid holidays in this way was seen to be intimately related to manipulating the wage-rate; a form of direct intervention into the market that was still heavily criticised.

Extending a right to be paid for employment that was distinct from the basic right to be paid wages for labour still seemed limited, therefore, to those whose employment relationships more closely resembled a form of contractual, or personal, service. Parliament was still hostile to the idea of *requiring* an employer to pay for anything other than actual labour:

'...while everybody who values service must realise that they must give a good measure of reward for that service, they do not necessarily feel that they can afford to do such things as give a week's pay for no work done to every man in the service of some of these great organisations.'⁷³

Having not yet fully embraced the potential of the concept of remuneration to be used as a mechanism through which to distinguish payments for employment from wages payable for labour, the extension of a contractual right to be paid for time not working was only going to be possible as the nature of industrial employment began to change, as employers recognised that it was legal rights in service, rather than labour, that they sought to obtain in the labour market.

⁷² HC Deb 15 November 1929 vol 231 cc2421-503, 2471, per Sir Rentouil.

⁷³ HC Deb 15 November 1929 vol 231 cc2421-503, at 2480, per Sir James Reynolds.

The first example of what can be called minimum 'remuneration' legislation was the Road Haulage Act 1938.⁷⁴ The Act was less concerned with regulating competition in the market than it was with guaranteeing that workers actually received from their employers something approximating a meaningful right to subsistence. Despite building on the Trade Board framework, therefore, the Act conferred on the Boards much broader powers, extending over piece and time-wages, over-time rates, and holidays with pay; they were to do more, in other words, than merely determine the 'true' price of labour. Thus, while:

'the Bill follows the precedent of previous legislation for the regulation of wages and does not make provision for the regulation of conditions of service or conditions of employment...it will be possible under the Bill to fix remuneration for overtime and to specify the number of hours beyond which overtime *remuneration* must be paid (etc.)'⁷⁵

Stopping short of providing Boards with a power to set minimum terms and conditions of employment, the Act nonetheless made provision for setting minimum rates of remuneration and, as a result, provided that the minimum rate would be implied into any contract between a worker and employer providing for a lower rate of remuneration.⁷⁶ It did not, therefore, and in contrast to the Trade Board Act, merely impose upon an employer a statutory obligation to pay. It guaranteed to all workers a right to recover by way of civil proceedings what was to be a reasonable remuneration for being employed under an express or implied contract of employment.

The Road Haulage Act made provision for compulsory arbitration in response to complaints by unions and workers concerning the payment of 'unfair remuneration' a mechanism which was regarded at the time as a 'practical experiment'.⁷⁷ The purpose of the Act was to 'help

⁷⁴ (1938) Geo.VI, c.70.

⁷⁵ HL Deb 29 June 1938 vol 110 cc387-410, 388, per Lord Templemore.

⁷⁶ Section 6(1)

⁷⁷ HC Deb 11 May 1938 vol 335 cc1611-57, 1619, per Mr Brown.

industry to self-government,⁷⁸ recognising that '[our] voluntary collective bargaining system is one of the most potent instruments for the stability of our national life.'⁷⁹ Determining what was 'unfair' still required that regard be had to collectively agreed rates, but the purpose of this was not now to establish the 'true' market price that would have been agreed had the parties been capable of acting freely, but to determine what was generally regarded as a fair remuneration or return from employment.

In 1938, building upon the premises in the Road Haulage Act, Parliament finally enacted its Holidays with Pay Act, empowering Trade Boards and other industry-specific Wage Boards to provide up to a week's annual holiday, to which the minimum rate for the industry would apply. In contrast to the debates in 1929, however, this time the right to holiday pay was being phrased as a right to holiday *remuneration*.⁸⁰ The shift in opinion over the importance of such intervention was due in part to the fact that many employers were making provision for such rights themselves:

'The effect of such a measure would surely be no more than to bring what at present everyone would regard as the backward employers of labour into line with the practice of enlightened employers, whether private individuals or public authorities, at the present day.'⁸¹

The express object of the Act was thus to address remaining status distinctions between blue and white-collared workers, recognising that wage-workers had as much a need for holidays to 'improve their material comfort' as did the better paid.⁸² Falling short of providing a right to paid holidays in industry generally, the Act nonetheless paved the way towards transforming the role of the Wage Boards, for they were now being empowered to set not just wages, but certain minimum rates of remuneration - securing an absolute right to be paid that was for the first time being decoupled from the provision of labour.

⁷⁸ HC Deb 11 May 1938 vol 335 cc1611-57, 1620, per Mr Brown.

⁷⁹ HC Deb 11 May 1938 vol 335 cc1611-57, 1621, per Mr Brown.

⁸⁰ HL Deb 25 July 1938 vol 110 cc1094-103, 1096, per Lord Templemore.

⁸¹ HL Deb 25 July 1938 vol 110 cc1094-103, 1102, per the Earl of Listowell.

⁸² HC Deb 15 November 1929 vol 231 cc2421-503, 2431, per Mr Hudson.

During the 1930s, therefore, it might be said that the traditional distinction between wages and salaries was becoming blurred, for even the former appeared as something that was payable not for labour, but for service, or employment. In this context, the term remuneration was gradually being employed in place of *wages*, to refer to all those payments paid *as if* the worker had been working when he had not. Statutory minimum wage rates were also sums that were payable *as if* they reflected prices agreed in the market. Now that these sums were beginning to be influenced by non-market considerations of fairness, therefore, the path was being laid for a much clearer distinction between the market wage and the minimum rates of remuneration that the legal system provided to elevate this into a right to subsistence.

In the first half of the 20th century, however, the co-existence of these different ideas of the wage continued to create tensions in legal discourse, as the cases decided under the Agricultural Wages (Regulations) Act 1924 and the Coal Mines (Minimum Wages) Act 1912, explored above, have already shown. The problem here was that this legislation established a link between wages and the existence of an executory contract of employment, and this made it unclear for what exactly the wage was to be paid; ongoing service, or labour rendered. This issue was revisited in *Smart v Spencer* 1948 by which time it seems the distinction between minimum wages and minimum rates of remuneration was becoming clearer.

In his judgment, Somerville J drew a distinction between the legal, and economic, concepts of the wage, a distinction which broadly corresponds with that between remuneration and wages. He argued that there were 'two types of legislation that might impose terms as between employer and employed.' Legislation might provide 'a minimum wage for work done' or might instead provide that 'a man should receive wages in respect of a period when he does not work and is not required to do so.'⁸³ Legislation of the former type was concerned with the 'primary provision of any contract of service...what is to be paid for the work which a man contracts to do during the period in question' (market wages). This was different from legislation concerned with what an employer might promise, or be legally required, to pay

⁸³ *Smart v Spencer* [1948] 2 KB 105.

during periods of sickness or holiday (remuneration).⁸⁴ There was a distinction, therefore, between minimum wage legislation, and legislation concerned with securing reasonable remuneration for employment. The problem for those bringing a claim under the Coal Mines or Agricultural Wages Acts, therefore, was that the presumption was that if the term wage was used there could be no logical basis for imposing (for example) a minimum rate to be paid during sickness and holidays in a particular industry. Such an approach could not be justified simply because wages were thought to be too low. The Agricultural Wages Act (and the Coal Mines (Minimum Wages) Act) having provided for minimum wages, they had to be construed as being concerned only with regulating the price of labour. They thus said nothing as to what a worker should receive as income from employment.

In light of this, Somerville J suggested that the term 'employed' as it was used in the Agricultural Wages Act had to be taken as referring to time actually working. It was irrelevant that the Act included within the definition of wages certain benefits, such as an accommodation allowance, that would be payable independently from time working, for 'the fact that under the Act such a benefit may be reckoned as payment of wages for the purpose of the minimum rate would not necessarily make it wages in other contexts.'⁸⁵ Even though the statute hinged the right to the minimum wage to the existence of a contract of service, therefore, the wage *rate* itself was only payable for labour. The term 'wages' might incorporate non-monetary benefits not directly linked with work for some purposes, therefore, but these were not wages to which the obligation to pay minimum rates could attach.

It seems from this that a distinction must be drawn between a relational or 'legal wage,' some benefit given as quid pro quo for service or employment, and the concept of the wage as used in legislation concerned with how much a worker is entitled to be paid (a market wage). Benefits in kind may be given in 'quid pro quo' for service, but such were not seen to be part of the minimum wage that was payable for labour once the existence of a service relationship had been proven. In the context of prescribing minimum rates, the term wage had been used in its 'economic' sense, therefore, to refer to the monetary equivalent of labour and so includ-

⁸⁴ *Smart*, 112.

⁸⁵ *Smart*, 115.

ed within its scope only those monetary benefits referable to time actually working. It did not include those benefits designed to support and maintain the worker, or to guarantee his well-being, benefits which could be said to form part of the total consideration due, or contractual remuneration payable, under a contract of service.

This suggests that co-existing within legal discourse was a concept of the wage akin to the pre-industrial idea of a sum, or maintenance cost, that is payable for ongoing service, a form of subsistence wage, and the concept of an 'economic' wage as the price payable for commodified labour. But the wage might also be something that expresses not the content of a right to be paid, but something which might go towards proving that there exist legally enforceable rights in labour, a form of 'quid pro quo' for rights in service. For this reason, and consistently with the decision in *Hooley* and *Churm*, Somerville J argued that the obligation to pay wages presupposes enforceable rights in labour, a particular form of social relation characterised by service, but does not necessarily require an express promise to pay monetary wages.⁸⁶

Thus while 'the payment of wages may be an element in deciding whether the relation of employer and workman exists...if upon the facts of the case it appears that the relationship does exist....it signifies nothing whether the wages are paid direct or whether there is some indirect method or machinery for paying them.' The employer will still, it seems, be bound to pay monetary wages.⁸⁷

Thus, while the distinction between wages and remuneration was becoming increasingly clear, the wage itself was no longer being confined to that which was payable for commodified labour. It had a deeper significance within the legal system as a right that was specific and integral to a particular social relation, one in which the courts were beginning to believe that certain mutual rights and obligations should (once again) be implied. It was with a view to guaranteeing such mutual rights and obligations that the concept of contractual remuneration and the technique of implying an executory contract, was slowly being embraced. These ideas were eventually to be given legislative expression in the Wages Councils Act 1945.

⁸⁶ *Hooley v Butterly* [1916] 2 AC 63.

⁸⁷ *Hooley*, 71 per Earl Loreburn.

4.3 Minimum Remuneration Legislation

Both the Wages Councils Act 1945 and the Catering Wages Act 1943 were premised on 'the idea of a joint body working together' to continue the war time policies of full employment[and securing reasonable standards of pay and working conditions for all.⁸⁸ The former Act was to provide 'for the regulation of the remuneration and conditions of employment of workers in certain circumstances' and to this end provided for the establishment of Wages Councils which had the power to set not just wages, but holidays with pay, overtime rates, and to prescribe certain minimum terms and conditions of employment. The scheme imposed on the Minister a duty to take steps to improve any existing machinery for setting remuneration if it seemed to be inadequate, was likely to become inadequate or if a reasonable standard of remuneration was unlikely to be maintained.⁸⁹

In contrast to the trade board legislation, the Act was expressly concerned with what the worker received from employment, rather than what the employer paid for labour in the market. The Wages Councils Act expressly defined remuneration as 'the amount *obtained* or to be obtained in cash by the worker from his employer... *in connection with* his employment.'⁹⁰ Moreover, by making *employment* rather than *labour* the reference point for the payment of the rate, the Act firmly embedded the link, emerging in the common law, between the right to a reasonable remuneration and the existence of a particular type of relationship characterised by faithful service and stable employment.

The Act mirrored the Road Haulage Act in that it stated that the effect of a Wages Regulation Order was that 'if a contract between a worker and employer to whom an Order applies provides for the payment of less remuneration than the statutory minimum, it shall have effect as if it provides for the payment of the statutory minimum.'⁹¹ Provided there was a contract therefore, of any type, whether of employment or for labour, the worker would be entitled to

⁸⁸ Catering Wages Act, 6 & 7 Geo VI, c.24 (1943); Wages Councils Act, 8 & 9 George VI, c. 17 (1945). See: HC Deb 16 January 1945 vol 407 cc69-116, 110, per Mr Corquodale.

⁸⁹ Section 3.

⁹⁰ Section 13.

⁹¹ Section 11(1).

be paid the 'reasonable' remuneration established by the Councils. In contrast to the Agricultural and Coal Mines Wages Acts, there was no requirement for the worker to be employed *under* a contract of service, or employment. Instead, the Act envisaged that the courts would imply an executory contract (in the ongoing relational sense) so that workers would enjoy a contractual right to minimum remuneration, holidays with pay and certain standard terms and conditions; benefits conditional upon employment rather than time working.

The policy behind the Act was consistent with that underpinning the National Insurance Act 1946, in that it envisaged a unitary model of employment premised upon ongoing mutual obligations of faithful service and social protection, a functional equivalent to the pre-industrial ideas of mutuality that the concept of tenure has been used in this thesis to express. This provided room for the courts to draw upon contractual techniques to transform the precariousness of the right to the wage into something resembling the stability of the salary. This it did by invoking the concept of remuneration, a contractual right to be paid that could be implied whenever labour was provided, thereby providing an additional dimension to the worker's right to be paid.

The rights envisaged by the Wages Councils Act, like other social welfare legislation enacted at this time, could only operate if the contract between the parties could be seen as ongoing and continuous in nature. It required more, therefore, than a series of contracts for work and wages and/or de facto control over labour on an on-going basis. The contractual model envisaged by the legislation thus worked in tandem with the courts to reconstitute the labour relationship in a form in which it could be regulated, to imply an executory contract envisaging ongoing obligations of continued performance, and with it, certain mutual rights and obligations capable of securing workers a subsistence wage, and employers faithful and obedient service.

By using the term remuneration, the Wages Council Act had been able to build upon the worker's absolute right to be paid wages for labour: by providing an additional contractual right to remuneration as an incident of the relationship which the market transaction expressed. Workers could still bring an action in debt, or under the Truck Act, for unpaid wag-

es, therefore, but could also bring a contractual claim to recover remuneration in the event that the employer failed to pay.⁹² In this way, the legal system made it possible to enforce a free bargain between legal equals in the market, an exchange of labour for a wage, while guaranteeing at the same time the subsistence wage and faithful service that this presupposed.

The gradual assimilation of the positions of the salaried employee, hired to serve, with that of the subordinate and dependent wage-worker had the effect of subjecting higher status employees to the norms of subordination and obedience that wage-labour had long implied, while at the same time extending to wage-workers the legal obligation to provide faithful service that had been a condition for the latter's contractual right to remuneration. By these means, the proprietary relationship between a master and his servant had been re-established, given a new foundation, however, in the express or implied contract of employment. Long-forgotten ideas of tenure had thus been rediscovered, reconstituted, however, in a form that was compatible with the cognitive framework that is constitutive of the labour market.

4.3.1 The Legally Constituted Market Wage

Prior to the Second World War, legal intervention in the contractual relationship between higher status employees and their employers had been minimal. Contractual remuneration for employment was not, in contrast to the wage, something that was deemed to be set by the market, nor was it something that was vulnerable to distortions that it was assumed to be the legal system's role to correct. In the mid-20th century, therefore, the question for the courts was how the use of the term wage in legislation enacted prior to the war ought to be conceived in an age when it was assumed that the content of the right to be paid for employment could be legitimately influenced by considerations external to the market. Rather than reading the concept of the wage as referring to the market wage that was payable for labour, the court instead assumed that the wage, particularly where paid for service, ought to be treated as equivalent to the concept of remuneration. This reflected, it seemed, an emerging idea that

⁹² The Act made express provision for this for, by virtue of section 13(4) of the Act: 'Nothing in this section shall be construed as authorising the making of any deduction, or the giving of remuneration in any manner, which is illegal by virtue of the Truck Acts, 1831 to 1940, or of any other enactment.'

legal regulation of pay rates was concerned with more than guaranteeing that the employer paid the market wage, particularly where what was being purchased was personal service rather than (only) abstract labour time. In a sense, the legal system was beginning to redefine its relationship with society and the market, embracing a role in actively shaping the way in which the market, and the wage itself, was conceived.

These ideas are evident from the court's approach to statutory construction in *Re Walker's Decision* 1948. Like *Roberts v Hopwood*, *Re Walker* was decided under s.62 MMA, but after the Wages Councils Act had been enacted. Pursuant to its power to set the wages of its 'servants', the Council had set those of its male workers, providing for an additional sum to be paid by way of a children's allowance. The question for the court was whether in doing so the Council had exceeded its statutory power to set wages. The Court argued that it had not:

'[While] children's allowances could have no relation to the value of the employee's services [and] payment of them...could not be regarded as a pecuniary return for services rendered...[nonetheless] any sums paid by the corporation to their servants are wages.'⁹³

Rejecting the view expressed in *Roberts*, the court argued that non-market considerations could be considered in setting wages, for the market rate could only ever be a guide. Sums such as that in question would still be classed as wages provided that they did not 'manifestly exceed the sums which would have been arrived at on economic principles.'⁹⁴ In particular, considerations as to the costs of living would be essential in calculating the proper 'price' of labour, just as would the price agreed between the two sides of industry.⁹⁵ It was only if the rate was set by wholly 'philanthropic considerations' that they would be described as 'gratuities' and so fall out-with the definition of the wage.⁹⁶

⁹³ *Re Walker* [1944] KB 644, 648.

⁹⁴ *Re Walker*, 652.

⁹⁵ *Re Walker*, 651.

⁹⁶ *Re Walker*, 656.

The clear divide between wages set by the market, and remuneration, as something that could be influenced by the law, could not, it seems, be practically maintained. However clear the distinction had become when viewed in the abstract, it was clear that the market wage could not be determined entirely independently from considerations about the costs of subsistence. Even payments for labour might deviate from the 'market-rate' in the sense of the sum agreed between 'free and equal' subjects, particularly where Parliament had expressly provided for a wage that was to be set by third parties. The effect of these changes was thus to build into the *market wage* the subsistence wage that the obligation to pay contractual remuneration implied.

4.4 Conclusion

It seems from the analysis above that throughout the 20th century, the legal system had begun to see a role for itself not just in facilitating the operation of the pricing mechanism, passively responding to prices freely agreed and remedying instances of distortion, but in actively shaping it, influencing the way in which value-based assessments were made. From this perspective, the market wage was itself something that was constituted by law for, at least in those contexts in which Parliament had sought to intervene, it could no longer be maintained that the wages set were dictated entirely from within the market process. Even the market wage would only be classed as such if it truly reflected labour's value, and this now meant that it had to have some relation to the costs of living, informed too by considerations of fairness. It was the legal system, therefore, that determined whether the pricing mechanism was operating effectively; wages were not 'natural' merely because they were left to the 'natural' forces of supply and demand. The legal system's role in providing the conditions for the labour market to function thus went beyond providing the conditions for its autonomy, for free competition, for by shaping the decision-making practices of the parties, the legal system determined the boundaries of the 'free' agreement, and with it, the meaning of the so-called 'economic' principles by reference to which the 'true' wage was set.

Integral to this process was the mutually reinforcing relationship between the Wages Councils Act and the Truck Acts and common law protection for the right to wages. The latter two prevented inequality of bargaining power from depriving workers from their right to be paid at least the market value of their labour. The Wages Council Act, by contrast, was the mechanism through which the legal system built into the employer's obligation to pay not just an obligation to pay the private, but also the social, costs of labour. Intrinsic to this was the distinction between the wage that is payable for labour, and the remuneration due for the benefit of providing that labour over time.

It can be concluded from this that during the mid-20th century, the market wage was the product of a set of institutional preconditions that included the worker's right to subsistence. To be recognised as capable of freely disposing of a commodity, workers had to act through an institutional framework that guaranteed their subsistence, making employee status, and the social rights to which it gave rise, a precondition for the emergence of a market wage. For this reason, the concept of the wage had gradually become something that connoted ideas of fairness and subsistence, and this appears to have obscured the significance of the distinction between the legal concepts of the wage and remuneration. This configuration, by building into freedom of contract the worker's right to a subsistence wage, had in this sense made possible the commodification of labour by providing support to the market in a way which could be both economically and socially sustainable.

The next chapter will show that from the 1980s, this framework has been breaking down. This reflects a much more fundamental shift taking place in law's ontological status. A close-reading of legal discourse throughout the period indicates that law is no longer seen to play any constituting role, either in the employment relationship or the labour market more generally. Instead, the labour market is seen as a pre-constituted reality to which the legal system simply adjusts. The task for the courts is thus to identify the parties' pre-existing rights and obligations, and to simply guarantee that they can be enforced. In other words, the wage is not legally constituted, for the content of the wage is deemed to 'mimic' the wage that is, or would be set, by the market.

CHAPTER FIVE

Market-orientated Conceptions of the Minimum Wage: The Wages Act Model

5. Introduction

This Chapter focuses on developments taking place in the legal framework concerning workers' right to be paid from the 1980s onwards. It shows that the Wages Act 1986 signified a change in the prevailing juridical conception of the wage, which moved away from the right to subsistence previously embodied in the right to remuneration, in favour of a market-orientated view of the worker's right to payment.¹ This, it will suggest, was part of a wider change in the prevailing conception of the role of labour law, away from an active market-constituting role towards a more passive role in enforcing naturally 'free' agreements.

This chapter will show that the basic premise today is that markets and the legal subjects populating them are self-forming and self-adjusting, and so are logically prior to the state and the law. This is the perspective that reveals itself from a close analysis of the legal discourse of the period. The legal system can regulate the market, therefore, reducing transaction costs, supporting, and enhancing, their efficiency, but has no role in constituting it, providing the conditions for its existence. In practical terms, this means that to impose an obligation on an employer to pay more than the pre-constituted market wage is an illegitimate restriction on his freedom. It is not, therefore, part of the broader process through which the legal system constitutes all legal subjects as free and equal so that the agreements between them can be recognised in law as binding.

It is in the Wages Act 1986 and the common-law developments relating to it that this new ontology is most evident. To illustrate this, Section one of this chapter will explore the back-

¹ Wages Act, 1986 c. 48.

ground to the Act before explaining how this has altered the legal regime concerning the worker's right to be paid. This includes changes to the Wages Councils system and changes to the law on deductions from wages. Section two will then explore the evolution of the concept of the wage through an in-depth analysis of the wage-work bargain and statutory protection against unauthorised deductions from wages.

5.1 The Wages Act 1986

5.1.1 Socio-Historical Context

The Wages Councils had only ever been intended to be temporary, to no longer be necessary once voluntary bargaining mechanisms had developed. The collective bargaining focus of the Councils was somewhat ill-suited, however, to the industrial environment to which the problem of low pay was proving endemic. It seemed that voluntary bargaining rarely developed in the newly emerging service industries in which the Wages Councils were most needed. The result was that by the end of the 1970s, it was widely believed that the Councils had been unsuccessful, for they had largely failed in their aim of facilitating joint regulation.

These limitations notwithstanding, however, prior to 1979, there was still considerable consensus that the Councils were important. In the Government's Consultation Paper 1975, the overwhelming argument was for reform rather than abolition.² Employers supported the system because it was expedient and helped them to avoid complex local level wage-bargaining. They also believed that it provided them with important protection against unfair competition, the presumption being that any competition was unfair if it had the effect of driving down workers' wages.³ Even the Trade Unions, hostile at first to the threat the Councils posed to voluntary bargaining had, by the 1970s, started to support the system, arguing for its extension alongside a new statutory minimum wage.⁴

² Lucas 1990, 322.

³ Official Report, 19 March 1985, Vol. 75, c. 817.

⁴ Employment Committee 1985

The 1979 Conservative Government had an entirely different outlook when it came to socio-economic policy. Inflation, coupled with rising unemployment, had helped foster support for the belief that market forces were the most efficient mechanism for allocating resources.⁵ Both the regulation of terms and conditions of employment and collective bargaining had distortive, and inflationary effects, therefore, and the Wages Council system embodied both. During the late 1970s and early 1980s, the Councils were thus being criticised not only for failing to promote voluntary organisation, but also because collective organisation itself was deemed to be too great an intrusion on individual freedom of action in the market.⁶ Imposing on the parties terms to which they had not expressly agreed, the Councils necessarily set wages above what was seen as a 'natural' market-rate. They were inflationary, a threat to job creation, and partly to blame for rising unemployment.⁷

In 1986, in response to its consultation on the Wages Councils the government enacted the Wages Act. This was to replace entirely the existing framework for the regulation of wages, curtailing the powers of the Wages Council with a view to their demise, and replacing the Truck Acts with a new statutory right for all workers not to be subject to unauthorised deductions from 'wages.' The premises underpinning the Act were explained when the Bill was introduced into the House of Commons:

'The Bill is based on the central economic objective to which the Government have held since 1979 — to achieve an efficient and modern economy where economic growth is accompanied by low inflation, enabling us to compete in international markets and produce real, sustainable, productive jobs. To achieve that we need an efficient and productive private sector, not hampered by unnecessary Government-imposed regulations and restrictions. Secondly, we need an efficient labour market, where there is the minimum of constraints on the rights of employers and employees to agree to offer and accept jobs on contractual terms that suit them both.'⁸

⁵ Lucas 1990, 322.

⁶ Fredman 1986.

⁷ Lucas 1990. See also: Department of Employment 1988.

⁸ HC Deb 11 February 1986 vol 91 cc796-881, 796 (second reading) per Mr Clarke.

The Wages Councils Act had been modelled on a belief that the legal system played an important role in constituting and regulating the market. From an ontological perspective, it was presumed that the law played an important role in constituting individuals as legal subjects, instituting and supporting the freedom and equality that are presupposed by the very concept of a market. From this perspective, the market wage only came into existence once the legal system had recognised the parties as legal subjects and the agreement between them as a freely concluded contract that can be enforced.

In contrast to this, the Conservative policy was premised on a much more passive, reactive conception of the law, one that saw the market, and the bindingness of agreements, as ontological facts. The presumption here was that the legal system simply responds to what is already there, a pre-formed, fully functioning market system. The ‘powers of the wages councils [therefore] undoubtedly impose complex and unnecessary burdens on business.’⁹ The legal system can thus interfere with, or correct, that market, but it neither constitutes nor shapes it. Legal protection against deductions from wages is not part of the process by which the market wage is constituted, therefore, but amounts to an interference in an inherently free bargain, and for this reason, has an inevitably inflationary and distortive effect.¹⁰ In the words of Ken Clarke:

‘I do not regard labour as just another commodity, and I do not think that one can apply the rules of the market to the employment of people. However, if a system is introduced the aim of which is to put the cost of labour above that which it would otherwise be if freely entered into by an employer and an employee, by making labour more expensive people will be even less willing to take on labour and will look for labour-saving alternatives.’¹¹

⁹ HC Deb 17 July 1985 vol 83 cc326-39, 327, per Mr King.

¹⁰ See particularly: HC Deb 11 February 1986 vol 91 cc796-881, per Mr Clarke.

¹¹ HC Deb 11 February 1986 vol 91 cc796-881, 805, per Mr Clarke.

5.1.1 Reforms to Wages Councils System

Part II of the Wages Act introduced a number of changes to the Wages Councils system. Firstly, it significantly curtailed the powers of the Boards, confining them to setting a single basic rate of pay, single overtime rate and a maximum accommodation charge, removing the power to set holidays and to set minimum terms and conditions of employment.¹² Secondly, it introduced a single basic minimum rate and prevented Councils from setting different rates in accordance with skill and job function, requiring instead that they have express regard, when setting the rate, to its potential effect on the level of employment.¹³ Thirdly, the Act removed the Minister's power to create new Councils, making the Secretary of State solely responsible for decisions as to abolition. Even though the establishment of a Council had previously been based on whether the prevailing rate of remuneration was, or was likely to be, adequate, there was no obligation to consider this when taking decisions as to abolition.¹⁴ Instead, the only requirement was that the Minister 'have regard to current levels of remuneration.'¹⁵

Like the early Trade Boards, the Wages Councils were now to act as residuary mechanisms to check clear instances of low pay, confined to demonstrative instances of so-called market failure. Even here, however, it was believed that the Wages Councils would, in time, no longer have any role to play:

‘I have to make it clear that I do not see a great role for statutory minimum wage fixing, or wage fixing at all, in today's society. It was only after consultation that we decided to retain them in those industries where both the employers and the trade unions did not feel ready to embark on the kind of world that we are used to in other industries, where these things are freely negotiated and entered into by both parties.’¹⁶

¹² Section 14.

¹³ Section 14(6)(1).

¹⁴ (1945) 8 & 9 Geo. VI, s.3.

¹⁵ Section 13(2)(a).

¹⁶ HC Deb 11 February 1986 vol 91 cc796-881, 803, per Mr Clarke.

Having previously operated at the level of an ongoing labour relationship, the Wages Councils were now to play a basic and minor role in regulating a market transaction, merely ‘setting a minimum rate below which adults should not be employed.’¹⁷ The purpose of the Wages Councils was not, it seems, to constitute the parties as free and equal by providing the conditions for a right to subsistence. Freedom and equality was a natural and inherent trait that legal regulation could only contradict. For this reason:

‘Wages councils interfere with the freedom of employers to offer and job seekers to accept jobs at wages that would otherwise be acceptable.’¹⁸

Despite the Act having redefined the Councils’ powers to set a mandatory level of reasonable remuneration as one requiring them to set a minimum basic wage-rate, the Act did not replace the term remuneration with wages. This may be because the majority of those covered by the Wages Councils were employed in services, so it was the model of remuneration paid for service, rather than wages for tangible labour products, that dominated. Nonetheless, this necessarily meant that a concept that presupposed an ongoing contractual relationship was in fact being used in the context of legislation that was built upon a legal framework previously designed to regulate a market transaction, to guarantee that in addition to any right to contractual remuneration, workers enjoyed an absolute right to be paid for labour that could not be varied by agreement. This, as the rest of the chapter will show, was to create considerable confusion for the courts.

5.1.2 Deductions

The origins of section 1(1) Wages Act, what is now section 13(1) Employment Rights Act 1996 (‘ERA’), can be found in the Truck Act 1831. This established a right for all those within the scope of the Act to be paid in full, and in coin, all wages earned by, or payable, in ex-

¹⁷ HC Deb 11 February 1986 vol 91 cc796-881, 801, per Mr Clarke.

¹⁸ Department of Employment Consultative Paper 1985, cited in: Fredman 1986, 559.

change for any 'labour done' and rendered void any agreement providing otherwise.¹⁹ By definition, this provided workers with protection against deductions being made from wages, whether or not they were consented to in writing.²⁰ Because the Act left the position in relation to fines unclear, however, it was later amended so as to make it explicit that all fines, other than those which were fair and reasonable, had been imposed to compensate the employer for loss, and had been consented to in writing, were unlawful.²¹

The Truck Acts' protection only extended to manual workers, but attached to the 'doing of labour' within a trade rather than to a particular form of contract. Thus while the wage was defined as anything '*contracted* to be paid, delivered, or given as a recompense, reward, or remuneration for any Labour done or to be done' the Act provided that 'any Agreement, Understanding, Device, Contrivance, Collusion, or Arrangement whatsoever on the Subject of Wages, whether written or oral, whether direct or indirect, to which the Employer and Artificer are Parties or are assenting, or by which they are mutually bound to each other, or whereby either of them shall have endeavoured to impose an Obligation on the other of them, shall be and be deemed a 'contract.'²²

The Wages Act repealed this regime and replaced it with a single statutory right not to be subject to unauthorised deductions from wages.²³ This is now embodied in the ERA, section 13(1) which provides a right not to be subject to deductions (that have not met the Act's pre-notification requirements), being made to wages 'properly payable' at the date of the claim, where wages is defined as 'any payment by an employer to his worker in connection with employment.'²⁴ This protection is conferred upon all those who are employed under a contract either of employment, or to personally do work. The effect of this provision was that, provided that the pre-notification requirements in the Act are met, deductions from wages would be lawful, irrespective of quantum. The only exception to this was a 10% limit on de-

¹⁹ (1831) 1&2 Wil. 4, c.27, s.3.

²⁰ Truck Act 1831, s.4.

²¹ Truck Act 1896, 59 & 60 Victoria, c.44. Controversial cases concerning the scope of the 1831 Act include: *Chawner*; *Archer*.

²² Truck Act 1831, s.25.

²³ For a defense of the Truck Acts and a criticism of the then proposed changes to the law, see: Goriely 1983

²⁴ Wages Act 1986, c.48, section 7(1).

ductions from the wages of retail workers made in respect of stock shortages.²⁵ For all other workers, the statute no longer prevented contracting out from the right to be paid all wages in full, and even exempted from the pre-notification requirements any deductions made in respect of strike action. In this way, it also weakened the mechanism of the strike as an alternative route through which to resist pressures to lower wages.²⁶

The framework established under the Wages Act is based on a very different set of premises than those underpinning the Truck Acts. It extends to all workers, rather than just manual ones, but the emphasis has shifted from the provision of labour to the form of the contract under which it is provided. This has had knock-on effects for the scope of protection, for the Wages Act did not replace the Truck Act's absolute right to be paid wages 'earned' in full. It simply provided a right to be paid in accordance with the terms of the agreement; the wages that are left once agreed sums have been withheld. It also changed the regime as it relates to fines, for there is no longer any requirement that fines be fair and reasonable; all that matters is whether or not the employer has obtained the worker's written consent.

Rather than providing protection for a workers' property in his wages, that is, preventing the parties from waiving, by agreement, the absolute right to be paid that had once been conditional only on the provision of labour, coupling this with a contractual right to be paid a minimum remuneration for employment; the Wages Act simply provided a right to be paid wages for labour provided *under* a particular form of contract. For all but a very few (those engaged in retail), therefore, this right was to be left entirely to the parties' 'natural' freedom of contract, 'leaving this, [and all] ...decisions to the parties by saying that what they agree to as deductions is lawful.'²⁷

Consistently with this, the Act defined the wage as 'anything paid by an employer to his worker in connection with employment'.²⁸ It thus incorporated a number of payments referable to the contract, or employment relationship, rather than just the provision of labour. It

²⁵ Section 2(1).

²⁶ McMullen 1986.

²⁷ HL Deb. 6 June 1986 vol. 475, col. 1242.

²⁸ Section 7(1).

was, in other words, a definition of contractual remuneration. The government had argued that this broad definition of wages was necessary to assimilate the positions of blue and white collared employees. Status distinctions, it was said, had ‘absolutely no place in modern industrialised society.’ For this reason, this reform formed an integral part of the ‘important new and modern set of rights for workers in respect of deductions from pay,’ because, by including within the definition of wages payments envisaging ongoing contractual obligations, this definition better recognised that many white-collared workers enjoyed a number of ‘fringe benefits that are not offered to manual workers.’²⁹ The problem, however, is that the Act abolished the power of the Wages Councils to make provision for such fringe benefits for workers unable to negotiate them for themselves. In effect, therefore, it protected workers from having such benefits withheld without their prior consent, but did not actually help them to secure them in the first place.

²⁹ HC Deb 11 February 1986 vol 91 cc796-881, 798, per Mr Clarke.

5.2 The Common Law and the Right to be Paid

5.2.1 Wages, Salaries and Remuneration

In principle, it is only those sums that fall outside the statutory definition of 'wages' that would be excluded from the scope of the industrial tribunal's jurisdiction. However, the effect of what is now section 14 ERA is that any deduction made in response to the events therein listed will also be excluded, and so must be assessed in the ordinary way in the common-law courts. Particularly controversial here has been section 14(5) which refers to deductions made in response to industrial action. In principle, this section does not establish an independent right for the employer to withhold pay in response to a strike. Its only effect is to exempt such deductions from the procedural requirements in section 13. In a given case, the overall legality of a deduction will thus depend on the contractual or other common law propriety of making it. If the contract does not expressly provide for such a deduction, therefore, the employee should be able to sue for it in the ordinary way.

In English law, a non-breaching party cannot unilaterally suspend his contractual obligations in response to the other party's breach. In bilateral contracts, it is no defence to argue that non-performance was a response to the other party's breach. If the non-breaching party affirms the contract, he cannot refuse to perform without placing himself in breach of contract.

In the context of the contract of employment, basic principles of contract law would suggest, therefore, that an employer who affirms the contract in response to his employee's refusal to work cannot unilaterally suspend his obligation to pay. If he refuses to pay, he will himself be in breach of contract. Following the earlier decision in *Miles v Wakefield* (1987), however, the Supreme Court has recently confirmed in *Hartley* (2017) that an employer will not be in breach of contract if he unilaterally withholds pay from an employee in response to a refusal to work. This is so, it seems, not only for employees paid wages, or a 'salary' in the sense of a

regular payment for *pre-defined* hours of work, but also for salaried professionals paid a periodical sum for a relatively open-ended and indeterminate obligation to serve.

The confusion underpinning these cases arises, it seems, from the courts' failure to distinguish first, between the concepts of the wage, the salary and remuneration and the different principles applicable to each, and second, between the contract by which labour was historically sold for wages, and the legal form of the relational contract of employment.

The previous chapter showed that it is only in the early twentieth century that the courts began extending this relational model to industrial workers paid wages.³⁰ Prior to this period, wage-workers would be hired by way of a contract that did not necessarily envisage any ongoing obligations between them and their employers beyond the immediate obligations of work and payment. That is not to say that each exchange did not translate in practice into implied obligations to perform work and to employ. The point, however, is that such obligations were deemed to be limited to single units, an hour or day, of labour and payment.³¹ For this reason, the worker's implied obligation to faithfully serve was not implied into an *ongoing* contractual relationship, an implied obligation to continue to offer labour service over time, but arose as an incident of servant status, a by-product of the annual hiring rule, and the penal provisions of the master and servant legislation. From the contractual perspective, therefore, beyond the immediate wage-work exchange, there was no ongoing obligation on the employer to pay his worker, no 'mutuality of obligation' beyond the obligation to pay wages for labour. In Mark Freedland's terms, there was no *relational* contract, no arrangement giving rise to a contractually protected interest in ongoing employment and payment.³²

From the medieval period, the principal action for enforcing informal agreements such as the labour contract was the action in debt. Debt differed from covenant in that rather than being based in an underlying promise, the obligation to pay was said to derive from the underlying transaction, from the fact that some benefit had been provided pursuant to some form of re-

³⁰ Deakin and Wilkinson 2005

³¹ Freedland 2005, 90.

³² Freedland 2005, 91.

ciprocal exchange.³³ To claim wages, therefore, a worker would have to prove that he had provided the full year's service for which the wage was paid. If the employer could show he had not enjoyed exclusive control over his servant for the entire period, therefore, that the servant had departed from service or been wilfully disobedient, he was under no obligation to pay.³⁴ He was not, in other words, in breach of any contractual obligation if he unilaterally withheld 'unearned' wages.³⁵

The essence of the labour agreement was not mutual promises, therefore, but actual *exchange*: in the context of an annual hiring, a full year's service for a full year's wages, and in 18th and 19th century industry, a day or hour's work, or a finished good, in exchange for a time or piece wage. If a manual worker could not prove he had produced the good or performed the hour or day's work, therefore, he was not entitled to be paid. It was this premise that came to be embodied in the Truck Act 1831, and the absolute right to be paid *wages* for labour 'done or to be done' that it envisaged.

According to this logic it is not difficult to see why the House of Lords in *Miles* might have assumed that an employer is entitled to withhold wages from a worker who refuses to work in breach of contract. In this approach, the employer's right to withhold is not the result of an implied condition in a bilateral contract of employment, however, but is a right inherent in the legal form of the pre-20th century labour contract as a simple exchange of commodities. Employers are not liable in damages for refusing to pay a worker who has not worked because their *only* obligation under the contract is to pay for labour rendered. But the distinctive feature of the relational contract of employment is that there are mutual obligations of ongoing performance. These early 'wage-work' bargain cases should not be relied upon, therefore, as authority for the cases arising today where the contract in question is a bilateral contract of employment.

³³ Ibbetson 2001, 34.

³⁴ Ibbetson 2001, 34.

³⁵ *Spain v Arnott* (1817) 171 E.R. 638; *Turner v. Robinson* (1833) 110 ER 982; *Ridgway v. Hungerford Market Co.* (1835) 111 E.R. 378; *Saunders*.

The courts' extension of the contractual model to industrial wage-workers in the early 20th century was particularly significant, therefore, for helping to elevate the market wage into something more closely resembling a right to subsistence. Not only did it provide the basis for the new forms of minimum remuneration legislation explored in chapter four, but it also provided a mechanism for shifting onto the employer some of the social costs not reflected in the wage. This it did first by decoupling the right to be paid from the obligation to work, implying an obligation to pay remuneration for time in contractual employment, and second, by implying into that obligation the costs of the various labour rights and protections to which the contract of employment gave rise.

The result of these changes was that by the mid-20th century, the gap between the rights of wage-workers and those of salaried employees had been narrowed. The courts no longer assumed from the fact that a wage was paid for work that there were no additional ongoing obligations between the parties, no obligation on the employer to retain and employ. In effect, they implied from the existence of a labour agreement a right to be paid that was independent from the right to be paid wages for work. Even if the contract stipulated for the payment of wages, therefore, employers could not unilaterally withhold payment without placing themselves in breach of contract:

'Assuming that there has been a breach on the part of the servant entitling the master to dismiss him, he may if he pleases terminate the contract, but he is not bound to do it, and if he chooses not to exercise that right but to treat the contract as a continuing contract notwithstanding the misconduct or breach of duty of the servant, then the contract is for all purposes a continuing contract subject to the master's right in that case to claim damages against the servant for his breach of contract.'³⁶

The significance of the concept of remuneration, therefore, was that it helped extend to wage-workers the relational model of the contract of employment that had previously been the pre-

³⁶ *Hanley v Pease & Partners* [1915] 1 KB 698, 705.

serve of the salaried employee. The rules applicable to the contract of employment, at least insofar as the questions of breach and payment were concerned, were no different from the rules applicable to bilateral contracts generally. However, the significance of the unitary model of the contract of employment that emerged in the mid-20th century was that it brought the labour contract within the mainstream development of contract law from which it had long been excluded. Through the legal concept of remuneration, moreover, the contractual wage could be elevated into something more closely resembling a right to subsistence. It provided a platform, in other words, through which to shift onto the employer some of the social costs of employment.

There remained an important distinction between the salary and the wage, however, when it came to the principles applicable in the context of the common-law debt claim. Claims in debt for unpaid *wages* will fail in relation to time when the worker was not working. Claims in debt for unpaid salary, by contrast, will succeed provided that the employee can show that the contract continued during the payment period in question. One particular benefit of the contractual right to remuneration, therefore, is that it is only if the contract has been terminated in light of the employee's prior breach that the debt claim will have to be brought; otherwise, the burden is on the employer to bring a claim in damages to recover any loss caused.

If instead of affirming the contract the employer terminates the contract in response to the employee's prior breach, however, the only common law remedy available to the employee will be a claim in debt for any unpaid sums. In this context, wage-workers will only be prevented from claiming any unpaid wages that correspond with time not-working, whereas the situation for salaried employees is more complex because the salary is an indivisible payment for an entire obligation. Thus, at common law, the period between pay dates being treated as an entire contract, if the employee is dismissed between payments, they will be unable to claim anything in respect of the period in question unless they can prove that they have substantially performed.³⁷

³⁷ *Taylor v Laird* (1856) 156 ER 1203; *Saunders; Boston Deep Sea Fishing Co v Ansell* (1888) 39 Ch D 339

By the end of the 19th century, it was widely felt that this rule, the entire contract rule, operated unfairly vis-a-vis employees, particularly where the interval between payments was particularly long.³⁸ To mitigate the effects of this, therefore, the courts sought to extend the Apportionment Act 1870 to salaries payable under a contract of employment.³⁹

The purpose of the Apportionment Act was to render apportionable periodical payments such as rents and annuities so that they could be apportioned between successors in title.⁴⁰ The problem that the Act responded to arose where an office-holder or landlord died mid-way through a payment period, and it was necessary to apportion payments between the deceased's estate and his successor.⁴¹ To this end, and in order to include payments made to public-office holders, the Act included within the definition of annuities 'salaries and any other periodical payments' made in respect of tenure of the office.⁴² The Act presupposed that the payee had a proprietary interest in the payment, that the payment would continue to be payable irrespective of who had the right to claim it. For this reason, it did not extend to salaries payable as between an employer and employee under a contract of employment. It extended only to 'offices of a public nature,' therefore, and the rents or payments issuing or being derived in respect of them.⁴³ Given that the premise behind the Apportionment Act was to render apportionable payments payable to successors in title, moreover, it only came into operation on death or if the payee otherwise ceased to be entitled.⁴⁴ It therefore only applied to payments '...as will still be made to someone, though the payment to a particular individual has ceased'⁴⁵ and so had no application if the individual's right to be paid continued.⁴⁶

The extension of the Act to private employment was not uncontroversial: for despite the courts' growing use of the term salary to denote the periodical payments made to contractual employees, in the late 19th century Parliament continued to interpret the salary much more

³⁸ See the discussion in *Hartley v King Edward VI College (CA)* [2015] ICR 143.

³⁹ Matthews 1982.

⁴⁰ Matthews 1982.

⁴¹ Matthews 1982.

⁴² Section 5.

⁴³ *Lowndes v Stamford* (1852) 18 QB 425,434; 118 ER 160,164-5 (in respect of the 1834 Act). See similarly *Treacy v. Corcoran* (1874) IR 8 CL 40.

⁴⁴ Matthews 1982.

⁴⁵ *Lowndes*, 164-5.

⁴⁶ See the detailed discussion in *Sim v Rotherham* [1987] Ch. 216.

narrowly, confining it to the payment due to holders of a public office.⁴⁷ Nonetheless, the problem that the Act addressed, the question of how to apportion payments between two parties, was structurally similar to that which faced a salaried employee following termination of the contract. Here too there was a dispute as to how much the employee, who had continued to serve, but for less than the stipulated period, could claim, and how much the employer who had benefitted from the employee's services, but to a lesser extent than envisaged, could retain.⁴⁸ These issues only arose, however, if the contract had been terminated. Otherwise, the payment would still be payable on the same basis as before the breach. For this reason, despite its extension to private employment, it remained the case that it only applied if the contract had been terminated:⁴⁹

'The effect of s.2 of the apportionment Act 1870 is that, unless the parties otherwise stipulated, the salary of an employee *whose employment terminates during a pay period* shall be apportioned and paid in respect of the period actually worked.'⁵⁰

Prior to the enactment of the Wages Act 1986, therefore, the nature and scope of workers' rights to be paid was relatively clear. The wage was seen as a divisible payment for divisible obligations for work, such that for the purposes of a debt claim, a worker would have to prove that he had provided work to be entitled to be paid. The salary, by contrast, was seen as an indivisible periodic payment for an entire obligation, one that accrued per month of employment, irrespective of whether, and how much, the employee worked. If the contract was terminated, the right to be paid would depend on questions of substantial performance and the position under the Apportionment Act. For those hired under a contract of employment, how-

⁴⁷ For example, in the Income Tax Act 1842 Schedule D referred to all private professions (the self-employed) and referred to 'Profits, Gains, and Emoluments of such Professions, Employments or Vocations' while in Schedule E, applicable to the public sector, it referred to 'Salaries, Fees, Wages, Perquisites, or Profits' and 'Annuities, Pensions or Stipends . .' (Schedule D, case 2, rule 2; Schedule E, rule 1)

⁴⁸ *Moriarty v Regent's Garage Co., Ltd* [1921] 1 K.B. 423, 429 per Lush J.

⁴⁹ *Moriarty; Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 124; *Re Central de Kaap Goldmines* (1899) LJ Ch 18; *Re London & Northern Bank* [1901] 1 Ch. 728; *McConnell's Claim* [1901] Ch 728 and *Healey v SA Francais Rubastic* [1917] 1 KB 947.

⁵⁰ See, for example, *Item Software* at [117].

ever, irrespective of whether the contract provided for a wage or a salary, the employer could not unilaterally withhold even 'unearned sums' without placing himself in breach of contract.

To engage with the decision in *Hartley*, where the Supreme Court reached the opposite conclusion, we need to revisit the House of Lords' decision in *Miles*, to show how a much more systematic engagement with the concepts of the wage, the salary and remuneration can help shed light on some of the tensions we see in some of the recent case law.

5.2.2 Recent Case Law

Miles was an officer of the Crown, appointed under the Registration of Services Act 1953 and assigned to serve as a registrar of deaths, births, and marriages for Wakefield Council 37 hours a week in exchange for a salary fixed by the statutory scheme. Miles refused, as part of a union-backed plan to place pressure on employers to improve registrars' financial status, to carry out marriage ceremonies on Saturday mornings in accordance with the scheme, although he continued to provide 37 hours work per week as required. In response, the Council withheld 3/37th of his salary, after having told Miles he would not be paid for the Saturday mornings in question. Miles initially argued that he was entitled under the scheme to organise his own working time, but went on to argue that, even so, his salary was an unconditional payment for his occupation of the office, and so could not be unilaterally withheld even if he was found to be in breach.

Miles was an office-holder, and so because he had no contract with the Council, he fell outside the scope of the Wages Act and the provisions on deductions from wages. Thus, while the House suggested that Miles could be treated as an employee for the purposes of the claim, to successfully defend Miles' claim for unpaid salary, the Council had to find a common-law basis for unilaterally withholding 3/37th of his pay.

The first issue that the House had to address concerned the distinction between salaries and wages, and the implications of each for the scope of an employee's right to be paid. In this respect, the central question was whether a 'salary' payable to an 'employee' was, as Counsel

for Miles suggested, a contractual payment for contractual service, presupposing only the continuation of the contract, or whether the ‘salary’ was payable only in respect of work or services actually rendered. The second issue turned on the relationship between salaries and wages on the one hand, and remuneration on the other, and as such the claim in debt for unpaid wages and the employer’s contractual obligation to pay.

5.2.2.1 Wages v Salaries

It was clear from the terms of the statutory scheme that Miles was to be paid a *weekly* salary for a pre-defined period of work (37 hours per week). The House of Lords concluded from this that his position was no different from that of a ‘wage’-worker hired at a weekly wage. The obligations to work and to pay were, it argued, interdependent, for ‘the employer pays for work and the worker works for his “wages”.’ This is so, it seems, irrespective of whether the ‘wage’ is expressed as a weekly ‘salary’ or weekly wage for pre-defined hours of work.⁵¹

It seems from this that the House of Lords saw no meaningful distinction between a salary and a wage, at least when it comes to the conditions that must be satisfied for the purposes of the debt claim. It is arguable, however, that this was due to the specific nature of Miles’ salary, the fact that their Lordships interpreted the scheme as creating a right to be paid for a pre-defined period of work. Lord Templeman expressly recognised, for example, that there is a difference between salaried office-holders whose obligations might require that they provide service on Sundays, or Christmas, as and when required, and those with pre-defined hours of work like Miles, a distinction that would equally apply to private employees. He did not explain whether different principles might apply to each when it comes to the question of what earns the right to be paid.⁵²

In *Miles*, the House of Lords had argued that a salary, or at least a salary that envisages pre-determined hours of work, is *not* an unconditional payment payable for (contractual) service over time. Instead, it is a payment for work done, where the obligation to pay is only trig-

⁵¹ *Miles v Wakefield Borough Council* [1987] AC. 539, 557.

⁵² *Miles*, 556.

gered when that work has been duly performed. This meant providing work in accordance with the express and implied terms of the contract of employment, including the implied obligation to faithfully and obediently serve.⁵³ It thus implied that employees could not, by definition, be said to be working during a period of industrial action, because ‘an employee who works with an intention to harm his employer is no different from a worker who refuses to work at all.’⁵⁴

This interpretation was confirmed in *Wiluszynski* where the Court of Appeal argued that ‘an employee is not entitled to remuneration under the contract of employment if he is not ready and willing to perform *that contract*.’⁵⁵ Here, the employee’s refusal to perform a small part of his contractual duties per day amounted to a failure to ‘work’ that permitted the employer to reject the work and withhold each day’s payment without placing itself in breach of contract.⁵⁶

The High Court adopted a similar approach in *Cooper*.⁵⁷ This case concerned a full day’s strike among support staff at a sixth form college, to which the employer responded by withholding not only a full day’s ‘salary’ but also the holiday pay referable to the strike day in question. The court confirmed that an employer has *two* choices (short of dismissal) when it comes to responding to a strike, to deduct unearned sums (the ‘*Miles*’ basis of deduction), or to claim damages by way of breach of contract (the ‘*Sim*’ basis). For policy reasons, however, if the employer elected for the former, he was limited to deducting that which the employees could not sue for in a claim in debt. This meant the employer could not circumvent the Working Time Regulations by withholding an apportioned part of holiday pay.⁵⁸ This was not ‘wages’ in the sense of the value of labour to the employer, but part of the ‘total consideration under the contract.’⁵⁹ Only the *former*, the court argued, could unilaterally be withheld.

⁵³ *Miles*, 559, per Lord Templeman.

⁵⁴ *Miles*, 561, per Lord Templeman. See also Lord Bridge, 551.

⁵⁵ *Wiluszynski v Tower Hamlets LBC* [1989] I.C.R. 493, 199, per Fox LJ.

⁵⁶ For a discussion, see: McLean 1990.

⁵⁷ *Cooper v Isle of White College* [2007] EWHC 2831 (QB)

⁵⁸ *Cooper* at [32].

⁵⁹ *Cooper* at [8].

The employees in *Cooper*, *Wiluszynski* and *Miles* were all hired to provide a set amount of work per week.⁶⁰ In each case, therefore, although their contracts provided for a ‘salary,’ the term does not seem to have been used in the technical legal sense to refer to a fixed periodic payment for contractual service over time. Instead it is used in the generic sense to refer to the annualized total of that which is paid in exchange for a set amount of work throughout the year. The position in both *Sim v Rotherham*, decided while *Miles* was on appeal, and *Hartley v King Edward VI College* was different. Both these cases concerned industrial action by teachers whose were paid a salary in the sense of a periodical payment for professional service over time. Rather than prescribing set working hours, therefore, the contracts envisaged that the employees ‘provide a particular service to proper professional standards’ such that their right to be paid could not be confined to any pre-determined working hours or time spent at the workplace.⁶¹

For Scott J in *Sim*, the salary was something that vested in the teacher per month of employment. For this reason, even a breach of contract committed with an intention to harm the employer could not be equated with an absence from, or failure, to work.⁶² Industrial action was not, in other words, to be equated with a *total failure of consideration* capable of excusing the employer’s failure to pay, whether this took the form of a work-to-rule, as was the case in *Sim*, or a full day’s strike. In *Sim*, therefore, where the teachers had refused to perform cover-work in breach of an implied term of their contracts, the teachers had a good claim *in debt* for their salaries and, if the employer refused to pay them, for breach of contract. This was so even in respect of the salary due for the month during which the industrial act took place; since the contract was continuing, the employer continued to be bound by its contractual obligation to pay them. Scott J put this as follows: ‘each month a contractual right to a salary payment vests in the teacher...if in the course of a month there has been a breach of contract...if the breach of contract has not given rise to any recoverable loss...there is no deduction that can be properly made.’⁶³

⁶⁰ The case report does not give details of Wiluszynski’s contract, but this can be inferred from the trial judge’s discussion of the hypothetical possibility of reducing the salary ‘by 2-3 hours’ for the five-week period in question.

⁶¹ *Sim*, 255.

⁶² *Sim*, 263.

⁶³ *Sim*, 255.

By the time *Hartley* was decided, however, the status of this argument was unclear. In *Miles*, Lord Oliver had referred to *Sim*, but had argued that for the purposes of a claim in debt for unpaid salary, the employee would have to prove he *had been* ready and willing to perform his contract of employment during the period in question.⁶⁴ Neither he, nor the courts in *Cooper* or *Wiluszynski* drew any express distinction between a salary in the generic sense of an annualised payment for 'work' and a salary in the technical sense of a fixed periodical payment for contractual service over time. It seemed, therefore, that the principle in *Miles* would apply irrespective of the nature of the employee's contractual pay.

The dispute in *Hartley* arose when, following a day's strike by teachers at a sixth form college, the college sought to withhold 1/260th of their annual pay. Both the Court of Appeal and the Supreme Court accepted with little discussion the argument that the *Miles* basis for deduction applied, that 'pay for a strike day is never earned and cannot be claimed.'⁶⁵ The only question remaining was thus whether the college was entitled to deduct 1/260th of the salary, reflecting the number of weekdays in the year, or were limited to 1/365th to reflect the number of calendar days in the year. The answer to this depended on whether the salary was conceived as a payment for contractual service over time, apportionable by reference to calendar days, or, as in *Miles*, a payment for core working hours, apportionable by reference to time spent teaching at the workplace.

The court assumed, therefore, that it was necessary to find some basis for apportioning the salary. This followed from the idea that a single day's strike might amount to a total failure of consideration justifying the employer's refusal to pay. The problem, however, was that as in *Sim*, the teachers' salary was defined as a 'sum payable per annum, to be paid in monthly instalments.' Their contractual duties included working a minimum number of working days per year, referred to as 'directed time,' and 'such additional hours as may be needed to enable you to discharge your duties effectively including, in particular, the marking of students' work, the writing of reports on students and the preparation of lessons, teaching material and

⁶⁴ *Miles*, 567.

⁶⁵ *Hartley* (SC) at [11].

teaching programmes.’ The nature of this ‘undirected time’ was elaborated in the collective agreement, comprising a number of ‘professional duties’ neither limited to teaching hours, nor confined to tasks performed at the workplace. In light of this, the Court recognised that the teachers’ obligations extended far beyond an obligation to provide a minimum amount of ‘directed time’ at the workplace. Their salaries could not, therefore, be seen as divisible payments for a divisible obligation to work. Instead they were fixed periodic payments for ongoing service such that, *prima facie*, the entire contract rule applied.⁶⁶

To reconcile this with the decision in *Miles*, therefore, the Supreme Court had little choice but to find a basis upon which to apportion both the entire obligation to serve, and the indivisible obligation to pay. For this purpose, it invoked the Apportionment Act and its equal daily rate of accrual. In so doing, however, the Supreme Court not only applied the Act in a context to which it was ill-suited, where the contract, and the entitlement to payment, continued, but also fundamentally subverted the basic rationale upon which the Act had been applied to contracts of employment. Rather than being used to provide protection for the employee’s accrued salary in the event of wrongful dismissal, the Act had been relied upon to deprive employees of an apportioned part of the salary that they should never have been refused in the first place.

⁶⁶ *Hartley* (SC) at [11] and [25].

5.2.2.2 Wages and Salaries v Remuneration

In principle, the question as to what the employee must prove to make out a claim in debt for unpaid salary/wages is irrelevant when it comes to determining whether the employer is under a contractual obligation to pay.⁶⁷ The benefit of the contractual right to remuneration, as noted above, is that it prevents the employer from unilaterally withholding payment and placing the burden on the worker to establish his right to be paid. In *Miles*, however, the House rejected the premise of this argument, and the basic contractual principles on which it is based.⁶⁸ If a non-breaching party affirms the contract, he is entitled to refuse payment if the other party's breach is an implied condition for the obligation to perform.

Miles was not an employee; he did not actually have a contract of employment with the Council so there was nothing to ground an action by the Council for damages, nor a claim by Miles in respect of the Council's failure to pay. The case was quite different from an ordinary employment case, therefore, for the sole issue was if Miles, treated as an employee for the purposes of a debt claim, could make out his entitlement to the sums claimed. Thus, while Lord Oliver saw 'much force in [the] argument that the only route available to an employer would be a claim in damages for any loss flowing from the breach' he concluded that these principles were irrelevant on the facts because this was 'an action in which the plaintiff claimed certain sums as due to him by way of salary and in which, therefore, he assumed the burden of pleading and proving each essential allegation necessary to establish his entitlement.'⁶⁹

If this is so, it could be argued that the case provides no real authority for the contractual aspects of the claim, the question as to whether the refusal to pay would amount to a breach of contract. It is clear from the judgments, however, that their Lordships decided the case *as if* there was a contract of employment between the parties that continued following the

⁶⁷ Napier 1984

⁶⁸ *Miles*, 565 per Lord Templeman.

⁶⁹ *Miles*, 567 per Lord Oliver.

breach.⁷⁰ The decision can only be explained, therefore, by reference to the particular view of the contract of employment that their Lordships adopted: a contract that binds an employee to provide faithful service over time, but does not give rise to any binding and *enforceable* obligations on the employer to provide work and/or pay on an ongoing basis. The form of the contract is thus exchange, but the obligation to work is conceived in a form redolent of the relation of master and servant.

The cases that their Lordships relied upon to defend this position do not actually support the arguments made. First, most of the cases relied on are Scottish cases where ‘there [is] nothing particularly novel’ in the idea that ‘all the conditions of a mutual contract are dependent upon their counterparts.’⁷¹ English law does not recognise the ‘mutual contract’ as a distinct contract type, however, nor does it endorse the premise that a non-breaching party can withhold performance in response to another party’s breach. It is not entirely clear, therefore, why these principles are being relied upon to justify a decision in relation to the English law of the contract of employment. Second, of the two English cases relied on, one, *Henthorn*, arguably supports the contrary argument, while the other, *Creswell*, rests on a similar misconception as that which underpins the decision in *Miles*.

Henthorn was a dispute over the burden of proof in a claim for unpaid wages in respect of a period of ‘work to rule.’ The sole question for the court was whether it was for the employers or the employees to prove that the workers had (or had not) satisfied the condition for claiming wages. Lawton J suggested that ‘when a plaintiff claims he is entitled to be paid money under a contract which he alleges the defendant has broken, he must prove that he was ready and willing to perform that contract.’ It does not seem that he was saying, however, that the consideration for wages is performance of, or readiness and willingness to perform the contract.⁷² Instead, he was reiterating the point that the plaintiff must be so willing at the time he *seeks to compel the defendant to perform*. That is, when he brings a claim for breach of the contractual obligation to pay. It is exactly *this*, the workers’ *ongoing* readiness and willing-

⁷⁰ *Miles*, 565 per Lord Templeman.

⁷¹ *Laurie v. British Steel Corporation*, 23 February 1978 (unreported); *Turnbull v. McLean & Co.* (1874) 1 R. 730; *Alexander Graham & Co. v. United Turkey Red Co. Ltd.*, [1922] SC. 533.

⁷² For a similar interpretation, see: Napier 1984.

ness to perform, rather than their willingness at the time of the breach, that the employers were disputing in this case.⁷³ Lawton J's remarks do not contradict the idea that to claim in debt wages for a prior period, the workers need only show that they *worked*, or were ready and willing to work, throughout the period in question. In fact, the implication of *Henthorn* for *Miles* would have been that because Miles was, at the time of the *claim*, ready and willing to perform his duties, (I.e. he was no longer in breach), he would have been entitled to bring an action for breach of contract in respect of the Council's failure to pay.⁷⁴

In *Cresswell v Board of Inland Revenue* the court asserted the principle 'no work (or, at any rate, readiness to perform whatever work it is the employee ought to be willing to perform if physically able to do so) - no pay.' In *Creswell*, however, the court had conceded that 'direct authority [for this point] is slight.' The only (English) authority identified was *SS for Employment v ASLEF (no.2)* but, as Sedley QC for Miles noted, this case was concerned only with whether a work to rule *was* a repudiatory breach, and so said little on the effects of affirming the contract on the employer's obligation to pay.⁷⁵ The other cases relied upon were, once again, Scottish cases where the principle, in contrast to English law, is well-established.⁷⁶

The House of Lord's interpretation of the cases has, however, been confirmed by the decisions in *Wiluszynski* and *Cooper*. Both these cases simply assumed that an employer who does not wish to dismiss his employee following industrial action can either claim in damages for breach of contract and/or deduct such sums by way of equitable set-off, or unilaterally withhold a sum reflecting that which the employee could not sue for in a claim for unpaid wages - without placing itself in breach of contract.

Neither the teachers nor the Court in *Hartley* questioned the premise that, after *Miles*, an employer is entitled to unilaterally withhold a portion of a worker's wages and/or salary in re-

⁷³ *Henthorn and Taylor v Central Electricity Generating Board* [1980] IRLR. 361, 362-363. See: *ANAC v. Robinson* [1977] V.R. 87 where the employee was unsuccessful having failed to establish readiness and willingness to perform, the claim was for *damages for breach of contract*, not in debt. A claim in debt succeeded in *Welbourn v. Australian Postal Commission* [1984] VR. 256.

⁷⁴ *Henthorn*. See: Napier 1984

⁷⁵ [1972] 2 All E.R. 949. But see Lord Denning's remark at 967.

⁷⁶ [1984] 1 C.R. 508, 522.

sponse to a strike. However, because the court had recognised that the salary was an indivisible payment for an entire obligation - something emphatically denied by the House of Lords in *Miles* - the effect of applying the '*Miles*' basis of deduction was to create a situation in which one side of an entire contract appeared to have been suspended. Thus, while the teachers remained bound to continue to perform their ongoing obligation to serve, the employer could unilaterally suspend his *ongoing obligation* to pay. The situation was not dissimilar, therefore, from that which obtains following termination of the contract. This might explain why the Supreme Court determined the question of apportionment by invoking principles applicable to contracts that have been terminated. Its argument that at common law a salaried employee is not entitled to be paid for a payment period of a strike only holds where the contract has come to an end; otherwise, the obligation to pay continues as before. Similarly, the Apportionment Act need not even be considered where the contract is continuing, because it is *only* following termination that questions of substantial performance and apportionment arise. This confusion all follows from the now widespread failure of both Parliament and the Courts to carefully distinguish between the wage and the salary, and to differentiate the principles applicable to these two payments from the principles applicable to the employer's obligation to pay remuneration. This shows a complete lack of awareness of the important social and economic function that the contract of employment, and the concepts intrinsic to it, emerged to perform.

5.3 Conclusion

Neither Parliament nor the courts recognise a distinction today between the sum that an employer agrees to pay for work, and the legally constituted obligation to pay for ongoing service that the contract of employment implies. The function of the contract of employment is not, therefore, to provide stability to both parties' expectations, providing the employer with ongoing service and the worker with remuneration and social protection. It is simply the mechanism through which the employer guarantees that he will be able to make use of, and benefit from, the labour purchased by the wage.

Behind these premises lies a particular view of the role of the legal system and its relationship with the market. The legal obligation to pay is not a multi-faceted one consisting of obligations to pay for work or labour, and obligations to pay for service, implied from the worker's subordination and dependence. Instead, it is a single obligation to pay for labour rendered. It is this that is expressed today by what have become synonymous terms: wages, salaries, and remuneration. The courts' role today is not to impose an obligation to pay in light of labour law's broader function, therefore, but simply to guarantee that the employer actually pays what he agreed to pay, and even then, only if he has actually received the full benefit of the work for which he agreed to pay it.

The same ontological premises are embedded in the statutory framework itself. Rather than protecting workers from employer abuse of power, from being pressured to consent to deductions from wages, statutory protection against deductions guarantees only a right to be paid what is left of the wage once agreed sums have been withheld. Legal protection for wages is not seen as a precondition for freedom of contract, therefore, part of the institutional framework that *constitutes* the labour market, but something that exists entirely independently from that market and, restricting the parties' freedom, is to be narrowly construed.

The problem, however, is that both the common law and the statutory framework is built upon a legal framework that was based on a very different set of ontological premises. It is the courts' failure to engage with these premises that explains the confusion we see in the case law. Having lost sight of the distinctiveness of payments such as salaries and remuneration, *and* their protective connotations, this gives rise to a deceptive picture of the limits of what labour law can do when it comes to providing for wage security today.

The next chapter will show that similar premises underpin the National Minimum Wage legislation. That is, the National Minimum Wage Act 1998 reflects the same conception of the relationship between the legal system and the wage as the Wages Act.⁷⁷ In this framework, the law passively responds to an assumed reality, with no distinction being drawn between what the employer agrees to pay for labour, and that which he is required to pay as a matter

⁷⁷ National Minimum Wage Act 1998, c.39

of law in exchange for the rights that are implied by the contract of employment. In practical terms, this has collapsed the distinction between wages and remuneration that had once been crucial for aligning the private and social costs of labour. This has resulted in a legal framework that actively fosters below-subsistence employment, placing a heavy burden on the tax and social security system to bridge the gap between the monopsony 'minimum' wage and subsistence.

CHAPTER SIX

Wage Regulation and Tax Credits: The Conceptual Framework of the National Minimum Wage

6. Introduction

Legal mechanisms protecting workers from deductions have long formed part of a much broader legal framework that includes statutory wage regulation and the tax and social security system, working together to provide a form of ‘social’ wage. In light of this, Chapter six examines the National Minimum Wage (NMW) through the prism of its relationship with tax credits, using this as a frame through which to explore in more detail the structure of the National Minimum Wage Act (1998) and the concept of the wage it reflects.

6.1 Minimum Wages and Tax Credits

6.1.1 Context

In previous chapters, it was argued that there is an important difference between the market wage, as that which employers agree to pay for labour, and the costs of social reproduction. It is only if employers cover the full social costs involved in his use of labour, by paying a ‘subsistence wage’ that the labour market can be sustainable. This means the courts and parliament must embrace law’s constitutive role, its capacity to shape social relations, and thus the content of the employer’s obligation to pay. Otherwise, the only viable ‘solution’ to this social cost problem is a system of state-provided wage-supplements, and/or social services, designed to top-up the wage to subsistence level. This would respect and uphold, rather than shape, the market’s determination of the wage-rate.

In the medieval and early modern periods, when the service relation was embedded in a wider web of statutory and customary rules, the courts were more willing to see the wage as fulfilling a subsistence role. This is consistent with a broader understanding that the law helped

to fulfil the conditions for maintaining the economic and social order of that time, playing a ‘constitutive’ role in the formation of labour markets. By the end of the 18th century, however, the service model was falling into decline. The market was, for the first time, beginning to be seen as the only appropriate mechanism through which to determine wage-rates. If a gap opened-up between the wage and the costs of subsistence, therefore, the solution was deemed to be a system of state-provided wage-supplements designed to top up the wage to subsistence level –the law’s constitutive role had been implicitly rejected.

The first experiment with wage-supplementation came with the introduction of wage allowances along the lines adopted in the Berkshire district of Speenhamland in 1795. The Speenhamland ‘system’ arose out of a meeting at the Pelican Inn in the Parish of Speen. The purpose of the meeting had been to adapt current wage-rates in line with prices. For reasons which remain unknown, the magistrates decided instead to replace the system of wage-regulation with an allowance policy, a wage supplement designed to top-up the market clearing wage to subsistence level.¹ The magistrates thus committed themselves to making ‘allowances for the relief of the poor for their own support and maintenance’ by tying the wage-supplement to the cost of a loaf of bread.² If a labourer was in private employment, the Parish would be responsible for ensuring he received the recognised minimum, making up the difference between this and the wage his employer chose to pay him.

The Speenhamland system reflects an early attempt to externalise the social costs of labour from the market. By failing to set a mandatory pay rate, however, and resorting instead to the payment of allowances, the magistrates’ decision undermined incentives for both workers and employers. Guaranteed a minimum income irrespective of their employment status, workers had little incentive to find work, or to work more efficiently. In turn, because employers could count on the Parish to top up the wage to subsistence level, they had little incentive to pay much at all by way of wages. This further demoralised workers, while at the same time removing the employer’s impetus to develop new production methods by investing in labour-saving machinery. In time, this imposed an impossible burden on the Parish such that, by the

¹ Hammond and Hammond 1913, chapter 6.

² Reproduced in Hammond and Hammond 1913, 140-1.

early 19th century, even this ‘charitable’ supplement had dipped below subsistence level. Speenhamland had thus ‘confirmed’ the emerging view that even state provided wage-supplements ‘distorted’ the market, depressing wages below the ‘natural’ subsistence rate.³

The reaction to Speenhamland was so negative that, after the repeal of the Old Poor Law in 1834, the idea of paying wage supplements was not revived until the early 1970s.⁴ During this period, what the employer agreed to pay for work was more or less synonymous with how much the worker received in connection with his employment. The Trade Board Act did little to qualify this position, for it too implicitly rejected any constitutive role for the law, linking the right to be paid to the provision of a given quantity of, in most cases, concrete labour. The role for the minimum wage in this context was simply to provide for the ‘competitive wage’ that would have emerged but for market failure – the price for the worker’s commodity. The legal system’s only role was, in other words, to facilitate the identification and enforcement of the ‘real’ market rate.

In light of these observations, the Wages Councils can be seen as a significant staging post in the evolution of the minimum wage. The Councils had reflected a comprehensive attempt to shift the social costs of employment onto employers, and signalled a willingness to embrace a constitutive role for the legal system in the setting of wages. Rather than seeing social reproduction as a process that exists externally to the market, to be guaranteed *in addition* to the market wage, therefore, the labour market was seen to be integrated, or embedded, within a much broader process of social reproduction, one that was underpinned, and shaped, by law.

Working in conjunction with a relational model of the contract of employment, the Wages Councils Act had provided for a guaranteed minimum weekly income, irrespective of how much work was performed. If an employer sought to purchase labour with wages, therefore, it was implicit that he would have to pay the social costs associated with its use.⁵ This was achieved through the Act’s use of the term remuneration which, attaching to the employment

³ See the evidence in: Parliament 1824.

⁴ See: Deakin, Wilkinson, 1989; Wilkinson and others 2001. Providing a full narrative account of Speenhamland is outside the scope of the thesis. The reason for including it here is to set the scene for the analysis of the modern law on tax credits.

⁵ HC Deb 16 January 1945 vol 407 cc69-116, 74-5, per Mr Bevin.

relationship rather than the provision of labour, performed a functionally similar role to the servant's implied right to be maintained. The concept of remuneration reflected the idea that, irrespective of how much was payable as wages, the person responsible for paying those wages ought to bear the costs of subsistence. For this reason, the Councils set the minimum rate of remuneration, not by reference to any pre-conceived notion of a natural market-clearing wage, but by reference to what both sides of industry regarded as *fair* or *adequate*, taking into account considerations about the costs of living.⁶

The obligation to pay contractual remuneration, and to bear the costs of the various employment rights arising from the contract of employment, was independent from the obligation to pay wages for labour. Underpinning the Wages Councils Act, therefore, was a certain economic understanding of the need for employers to meet a greater part of the social costs of the reproduction of labour power, so that these costs did not fall entirely on the state. The role for the state was not to supplement the wage, therefore, but to provide for a comprehensive social insurance system, where earnings-related contributions and benefits could ensure that a subsistence income could continue during sickness, unemployment, and retirement.⁷

The implicit ontology of the law at this point was that the law did not simply react to market decisions made by the actors but actively constituted these relations with a view to achieving a balance of risks and costs between workers, employers, and the state. To avail himself of rights in labour, an employer would have to bear the social costs involved in its use – irrespective of how much he agreed to pay by way of wages. In the same way that the obligation to work implied an obligation to faithfully and obediently serve, therefore, the obligation to pay wages implied an obligation to bear the full social costs of employment, leaving little room for a system of tax credits and wage supplements designed to top up wages in order to ‘make work pay.’

6.1.2 Tax Credits and the National Minimum Wage Act 1998

⁶ See the discussion in Chapter four.

⁷ Deakin and Wilkinson, 1989.

Despite a lack of evidence about the negative employment effect of Wages Councils, and continued support for them among both sides of industry, as noted in Chapter five, from 1985, the government launched an attack on the Wages Councils that led to their gradual scaling back and eventual abolition in 1993. It was during this period that the government introduced a new wage-supplement, the Family Credit, an extension of the Family Income Supplement introduced as a temporary measure in 1971. The purpose of the credit was primarily to subsidise employers, to encourage them to hire workers at rates they could ‘afford,’ particularly given that the Wages Councils were seen to be setting rates above the level ‘required to fill jobs’ ... ‘prevent[ing] employers from developing pay systems wholly in accordance with the best interests of their businesses.’⁸ Thus, as the Opposition argued, it seem that:

‘The real policy underlying [the credit] is to try to force down wage levels by paying family credit through the employer, thereby encouraging employers, in addition to the other methods that the Government are using, to force down the wages of the low paid.’⁹

The 1970s and 80s thus reflected a return to the pre-1940s belief in the existence of an objective, market-clearing wage which *ought* not be artificially raised to take into account considerations about the costs of living. The result was a tax credit system *but no minimum wage*. Even the scope for market-failure, therefore, the premise that the labour market might not actually clear in practice, had been implicitly rejected.¹⁰ Labour markets could operate competitively provided that the state did not ‘intervene,’ and *any* attempt to do so by setting wage-rate could not but lead to unemployment:

‘[payment of relief to] persons in full-time employment...is something which is bound profoundly to distort the wage system and to frustrate the ambition...that a man should receive as near as may be the full value of his work in cash’.¹¹

⁸ Department of Employment 1988, 5. Social Security Act 1986, Part II, and SI 1987/1793.

⁹ HC Deb 01 July 1986 vol 100 cc813-5, 814, Per Ms Short.

¹⁰ HC Deb 03 June 1985 vol 80 cc34-51, 35.

¹¹ HC Deb 10 November 1970 vol. 806 cc 262 and 264-5, per Mr Powell.

The only exception to this was to be a limited system of wage-supplementation targeting low-wage-earners with dependent children, payable to mothers even when the eligibility was in respect to the father's earnings.

By the mid-1990s, with no legally binding minimum wage and no comprehensive system of wage-supplementation to top-up wages to subsistence level, concerns about rising levels of in-work and child poverty increased.¹² It was in this context that Labour launched its 'New Welfare Contract,' also known as 'the New Deal', a series of reforms intended to 'make work pay' through a reformed tax-credit system, a central element of which was to be a statutory minimum wage. Nonetheless, the minimum wage was not intended to be a living wage, as the Labour government made clear.¹³ The main purpose of the National Minimum Wage Act (NMWA) was to prevent employers responding to the tax-credit regime by decreasing wages, reducing incentives to work.¹⁴ Making work pay was not to be confused, therefore, with 'making *employers* pay.' This was not the function of the minimum wage:

'By setting a floor for wages, [the national minimum wage is] essential to ensure that low-income workers enjoy the full benefit of the tax credit.'¹⁵

The tax-credit system was expanded in 2002 with the introduction of the Working Tax Credit and the Child Tax Credit. In addition to providing a supplementary source of income to persons 'engaged in qualifying remunerative work' this regime also made it possible for tax credits and other forms of income support (such as statutory sick pay) to continue during periods of illness, incapacity, maternity or adoption leave. These are periods when the contract is continuing, but contractual pay (wages or sick pay) is no longer being paid.¹⁶ In effect, ra-

¹²HM Treasury 2001.

¹³See the discussion in: Laurie 1995.

¹⁴Treasury 2000, 6. .

¹⁵Treasury 2000, 17. For the current tax-credit regime see: Welfare Reform Act 2012 Part I, Universal Credit Regulations 2013, and Universal Credit (Work Allowance) Amendment Regulations 2015, SI 2015/1649. For a commentary, see: Puttick 2012.

¹⁶Tax Credits Act 2002 and Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002, SI 2002/05. It also assisted 'seasonal' workers and employees affected by suspension from work while complaints or allegations were being investigated, as well as providing (limited) protection to strikers.

ther than requiring employers to pay workers a subsistence wage as a *quid pro quo* for the benefit of having them employed under a contract of employment *when work was not being provided*, the state assumed these costs, confining employers' wage-related obligations to the payment of the private costs of a commodity. In this way, a distinction was emerging between the 'wage,' now understood as the market wage adjusted for imperfections, and the deemed subsistence income – the difference between the two being covered by the state.

This exclusion of the costs of social reproduction from the concept of the wage is implicit in the structure of the National Minimum Wage Act and Regulations (NMWR).¹⁷ Like the Trade Board Acts, the focus of the legislation is on what the employer pays for labour in the market, rather than what the employee receives by way of remuneration for employment. Its primary purpose is to guarantee fair competition, shifting direct labour costs onto employers to prevent them from using low wages as an artificial subsidy to under-cut their competitors. For this reason, the remit of the Low Pay Commission, the body formally responsible for setting the rates, does not, in contrast with the Wages Councils, extend to considerations about the cost of living. The Commission was tasked only with considering the impact of any proposed rate on businesses and on the employment rate; on how much fairness the market could bear.¹⁸ The rate was not, therefore, to have an adverse effect on labour demand. To the extent that fairness could be considered, it was to be achieved within the constraints set by the market.

6.1.3 Universal Credit and the National 'Living' Wage

In 2012, the Coalition Government replaced the Working Tax Credit, and the five other existing means-tested benefits, with Universal Credit, to be phased in gradually.¹⁹ The tag-line for

¹⁷Simpson 1999a; Simpson 199b; Simpson 2004.

¹⁸See the discussions in Low Pay Commission 1998, 15-19. See also: HC Deb 16 December 1997 vol 303 cc162-239.

¹⁹ It is currently set for completion in December 2018: <https://www.gov.uk/government/publications/universal-credit-transition-to-full-service> (Accessed 24 April 2018). Universal Credit Regulations 2013/356; The Welfare Reform Act 2012 abolished the following benefits: income based jobseekers' allowance under the Jobseekers Act 1995; income related employment and support allowance under Part 1 of the Welfare Reform Act of 2007; income support under section 124 of the Social Security Contributions and Benefits Act 1992; housing benefit

this policy was, once again, ‘to make work pay,’ but the emphasis has shifted away from seeing tax credits as a mechanism for bridging the gap between wages and workers’ subsistence needs, towards a much tighter dove-tailing between tax credits and minimum wages to reduce dependency on all forms of state assistance. In this way, it intended to ‘remove barriers to employment, smooth transitions back to work and remove distortions in the current system that prevent people from doing extra hours when available.’²⁰ It does this, however, by opening-up low-paid, insecure and part-time workers to a series of behavioural conditions that had previously been applicable only to the unemployed. To be entitled to state support, those in work as well as those out of work must meet a minimum (and progressive) earnings threshold, and must secure themselves additional hours and/or higher paid work/second jobs as a condition for claiming the credit.²¹ The focus of the ‘claimant’s commitment,’ the ‘contract’ that claimants must sign before being given access to the scheme, is thus on requiring claimants to meet certain work-search, work-preparation, work-training and work-preparation requirements, to make it more likely that they will ‘obtain paid work (or more paid work or better paid work)’ so as to avoid having their income reduced.

Intrinsic to this policy is the introduction, from 2016, of the National Living Wage (NLW).²² On its face, this would seem to be aimed at providing to all workers (over 25) a statutorily guaranteed ‘social wage’ capable of meeting at least the basic costs of living.²³ In practice, however, it falls short of doing so in many respects. Designed to work alongside Universal Credit’s conditionality requirements, its principal purpose is to reduce benefit dependency by requiring workers to take on more hours and second jobs at the ‘NLW’ level – without any express concern to tie that level to the costs of living. Instead, the wage is set to rise to a minimum rate of 60% of hourly median wages by 2020 – making no direct link between the wage and workers’ needs.²⁴ The NLW is not a ‘living wage’ in the sense implied by the Liv-

under section 130 of that Act; council tax benefit under section 131 of that Act; child tax credit and working tax credit under the Tax Credits Act 2002. See: Welfare Reform Act 2012, s.33.

²⁰ Pennycook 2012, 4.

²¹ Welfare Reform Act 2012 s.4(1), and sections 13,14,17 and 18 in particular. See parallel provisions in Universal Credit Regulations 2013.

²² National Minimum Wage (Amendment) Regulations 2016/68

²³ Grover, 2017; Osborne 2015.

²⁴ For a discussion, see: D’Arcy and Kelly 2015. The 60% target is the international standard required by bodies such as the European Social Committee, referred to as the ‘decency threshold’. It is also linked with the poverty

ing Wage Foundation, therefore, an organization that encourages employers to pay a voluntary ‘living wage’ that is linked with the public’s perception of what amounts to an adequate minimum standard of living.²⁵ Whereas the ‘real’ living wage attempts to make work pay by making *employers* pay a sum that reflects the social costs of labour, the NLW simply alters the distribution of those costs as between employers, and the state.

The express motivation for the post-2012 reforms was the government's desire to ‘reduce the welfare bill.’²⁶ The primary purpose served by a higher minimum wage rate was to help reduce unemployment and the costs of the tax-credit system to the tax-payer. All the NLW does, therefore, is change the arithmetical relationship between the minimum wage and the tax credit system - without touching the former’s conceptual foundations. As will be shown below, no accompanying change was made to the structure of the NMWA and NMWR, nor the link between work and payment which they reflect. Framed as a new wage supplement to be paid to more experienced workers aged 25 and over, with the ‘real’ minimum wage remaining in place, the policy is much more about encouraging workers to work as hard, and as much, as would be required *at prevailing wage-rates*, than it is about seeing the satisfaction of the subsistence needs of the working classes as a *conditioning factor* on the rate of wages, and thus on the rate of profit.²⁷

6.2 The Conceptual Structure of the National Minimum Wage Act (NMWA) and National Minimum Wage Regulations (NMWR)

6.2.1 The Legal Framework

line, defined at 60% of household income. The Bain review that led to the NLW came up with the 60% figure having analysed how this would place the UK vis-a-vis its international competitors, see: D’Arcy et al 2015.

²⁵ D’Arcy, & Kelly, 2015; Living Wage Foundation, 2016. For recent analysis of how the NLW relates to minimum wages in other European countries, see Eurofound 2018.

²⁶ Department of Work and Pensions 2010.

²⁷ Department of Business Innovation and Skills 2016.

The NMWR distinguish between employment, coterminous with the existence of the contract that establishes the worker's rights under the NMWA, and work, the period for which the wage can be claimed.²⁸ In practice, this means that the right to be paid the minimum wage extends to all those employed under a contract of employment or to personally provide work.²⁹ Nonetheless, the right to be paid a minimum wage is a right to be paid wages for *work*, rather than a right to be remunerated for time employed; personal service over time.³⁰ This makes the meaning of 'work' central when it comes to determining the scope of the employee's right to be paid. Nonetheless, because neither the NMWA nor the NMWR define the concept of 'work,' the scope of protection is very much left in the hands of the courts.

There is nothing in the NMWA or the NMWR that would prevent the courts from taking a functional approach to statutory interpretation. This would mean treating the meaning of work as something that depends on the time and/or duties for which the court believes the employer should pay, in light of the benefit he derives from this and the burden it places on the worker. For the most part, however, this is not the approach that the courts have taken. The courts instead tend to defer to the individual contract, identifying what the parties agreed the employer would pay for, seeing the meaning of work itself as something determined by agreement. By taking this passive, reactive view of its role in this context, much is left to the parties' relative bargaining power when it comes to determining the scope of the employer's minimum wage obligations.

6.2.2 'Work' and the National Minimum Wage

For the purposes of determining whether an employer has complied with his minimum wage obligations, the NMWR distinguishes between time-work, broadly corresponding with 'wage-work' payable for hours actually worked, 'salaried hours work', applicable to those paid for a set basic number of hours a year, 'output work', such as commission and piece-rates, and 'unmeasured work,' a residual category designed to catch all those whose working arrangements which fall outside the other three categories.

²⁸ National Minimum Wage Regulations, 2015/621, reg. 57-8, and National Minimum Wage Act 1998, s.54.

²⁹ Hayes 2015.

³⁰ Hayes 2015.

By virtue of special deeming provisions contained in regulations 27 and 32, salaried hours workers and time-workers also have a right to be paid the minimum wage for time that is not work, but which is deemed to be for the purposes of the Act. This covers periods of ‘down-time’ when the worker is effectively on-call - available at or near the place of work for the purposes of working - but not actually working within the context of the Act. It excludes, however, time spent waiting for work at home (neither ‘at or near’ the workplace), time when the worker is ‘not awake for the purposes of working,’ periods of leave that is expressly unpaid, and periods of industrial action. There is no right to be paid the minimum rate for travel time, therefore, for over-night lay-overs, for sleeping shifts, unless they fall within the contractual definition of ‘work,’ nor for periods of industrial action short of a strike when some work has been provided.³¹

It is clear from this that the Act’s definition of ‘salaried work’ is not to be confused with the historical concept of the term introduced earlier in the thesis.³² It applies to those whose contracts lay down a set number of basic hours for which they have, in theory, a right to be paid ‘regardless of the number of hours actually worked in a particular week or month.’³³ It is not confined, therefore, to those who are employed in a particular capacity to provide their professional services over time. In practice, moreover, because the courts defer to the individual contract to determine which of the worker’s contractual obligations count as work beyond the right to sickness and holiday pay, even those engaged in statutory salaried-hours work will only be paid for time when ‘work’ is, or is deemed to have been, provided.³⁴ For those whose contracts do in fact envisage ongoing service, therefore, the employer’s minimum wage obligation will only extend to a fraction of the time that their contracts require them to devote to their employer’s business (see below).

³¹ Regulation 34 expressly excludes time travelling between home and workplace. This has harsh implications in certain industries, as can be seen in: *Aslam v Uber BV*, [2017] IRLR. 4. See also: *Thera East v Mr J Valentine* Appeal No. UKEAT/0325/16/DM where the court left it to the contract to decide if travel time was ‘work’ that earned a right to be paid. On overnight lay-overs, see: *Baxter v Titan Aviation Ltd* (unreported) August 30, 2011 (EAT).

³² Regulation 21(5).

³³ Regulation 21(5).

³⁴ For particularly restrictive readings of this see *South Manchester Abbeyfield Society Ltd v Hopkins* [2011] ICR 254; [2011] IRLR. 300 (EAT); *Hughes v Jones (t/a Graylyns Residential Home)* Appeal No. UKEAT/0159/08MAA EAT.

The category of ‘unmeasured work’ reflects an alternative to salaried employment for employers wanting to benefit from having a worker on-hand to work and to do as much work, as and when required, without having to pay for the benefit of doing so. This category applies to workers whose hours of work are not specified, and who are required to work when needed or when work is available. Rather than being paid a fixed salary for time in employment, however, with the employer committing in advance to providing a minimum income or minimum hours of work, these workers are paid to complete a particular job or task, regardless of how long it takes them to do so and regardless of how (ir)regularly they are called upon to work. For minimum wage purposes, they must be paid for those hours spent performing what is classed by their contracts as work.³⁵

In *South Holland v Stamp* (2002), care wardens at a sheltered housing scheme were bound by their contracts to be on site continuously for 103 hours per week. The EAT rejected the argument that all these hours could be classed as ‘work.’ Instead, it was necessary to refer to a list of her contractual duties so that her eligibility for working time could be more tightly circumscribed:

‘...time spent by the respondents when they are not carrying out the contractual duties required of them under their contract cannot be counted [...] thus when a warden is at home on call but sleeping, washing, entertaining or carrying out domestic chores [the time does not qualify for national minimum wage payments].’

Regulation 44 on unmeasured work operates in conjunction with regulation 49 which makes provision for the parties to agree a ‘daily average agreement’ to determine ‘the daily average number of hours the worker is likely to spend in carrying out the duties required.’ In *Stamp*, regulation 49 had not applied because no such agreement was in place. The effect of such an agreement would be to provide a degree of certainty by specifying the minimum number of hours a worker could expect to be paid. Nonetheless, if the worker agreed that she would

³⁵ Regulations 44 – 50.

normally be engaged in performing her duties for 12 hours a week, but the tasks prove so demanding (for reasons outside the worker's control) that she in fact performs closer to 20, she has effectively waived her entitlement to claim the minimum rate for the additional 8 hours.³⁶ The premise behind the provision is that the NMWA ought not increase the costs of hiring labour on a casualised basis, nor decrease the attractiveness of 'flexible' forms of work. The inclusion of this provision is important, the courts suggest, to avoid a situation where the NMWA leads to the 'probable ending of [socially useful] employment...[by] pricing it out of the market.'³⁷

This argument was invoked in *Walton v Independent living organisation* (2003). Walton was a home-care worker who worked three days on and four days off to provide a continuous service in the home of a severe epileptic. Walton claimed that she was paid by the day ('time-work') and engaged in time work throughout a daily period of 14 hours when she was awake and providing care and supervision. The Court of Appeal rejected the argument that all aspects of her activities during the day could be classed as work, classifying her work as unmeasured work for the purposes of calculating the minimum wage. The daily average agreement stated that Walton's caring tasks only consumed 6 hours and 50 minutes in any 24-hour period. In fact, however, she was required to be on the premises at all times in case the patient required assistance.³⁸ Nonetheless, the court treated this as discretionary labour which did not attract the minimum wage, falling outside the tasks specified as work in the contract and extending beyond the hours agreed in the daily average agreement.

Both *Walton* and *Stamp* involved employees engaged in care-work for what the courts classed as unmeasured work. Similar problems arise, however, for those engaged in time or salaried work whose contracts require that they remain responsive to clients'/employers' needs on an ongoing basis.

In this context, the courts have drawn a distinction between those hired to make themselves available, to 'wait' for work, such as security guards or telephone operators, and those whose

³⁶ For a discussion of this, see: Rodgers 2009.

³⁷ *Walton v The Independent Living Organisation Ltd* Appeal No EAT/731/01, at [12] per Holland, J.

³⁸ *Walton*, at [3].

‘core work’ duties can (arguably) be distinguished from contractual duties that require that they also be on-call outside core working hours.³⁹ The EAT in *Focus Care Agency* noted too that the courts have also tended to draw a ‘clear dichotomy’ between those cases where a worker is working merely by being present at the employer’s premises, whether or not they have been provided with sleeping accommodation, and those where the worker is provided with sleeping accommodation and is simply on call (or available).⁴⁰ In the former case, the worker will be treated as working throughout the full duration of the shift. In the latter, however, the deeming provisions in regulations 27 (salaried hours work) and 32 (time work) will apply. This means that only the time when the worker is available to work ‘at or near’ the workplace, and is ‘awake for the purposes of working’ will be time to which the right to the minimum wage will attach.

If the contract clearly defines the work for which the employer is willing to pay, therefore, and requires in addition to that work that the worker perform a number of duties during ‘non-work’ hours, the worker will have to rely upon the deeming provisions to claim a right to the minimum wage in respect of those additional hours. By careful drafting, therefore, the employer can narrowly circumscribe how much of the time from which he in fact benefits is time to which the obligation to pay the minimum rate will apply. This can be illustrated by the decision in *Edinburgh Council v Lauder* (2012).⁴¹

In *Lauder*, the employee was engaged as a support worker in a sheltered housing facility. Her contract provided for tied accommodation, and required that she work 36 hours a week, and an additional emergency response for four nights a week. The question for the court was whether providing the emergency response could be classed as work for the purposes of the Act. Lady Smith found that Lauder had specific core day-time hours, that the emergency response cover was something required in addition to work, and so would only attract the min-

³⁹ Compare: *British Nursing Association v Inland Revenue* [2003] ICR 19 (CA) (telephone service); *Scottbridge Construction Ltd v Wright* [2003] IRLR 21 and *Burrow Down Support Services Ltd v Rossiter* [2008] ICR 1172 (EAT) (night-watchman) with *Wray v J W Lees & Co (Brewers) Ltd* [2012] ICR 43 (EAT) and *South Manchester* (duty house-keeper with sheltered accommodation).

⁴⁰ *Focus Care Agency Ltd v Roberts* [2017] UKEAT 0143_16_2104, 31. See also: *Whittlestone v BJP Home Support Ltd* [2014] ICR 275 (EAT).

⁴¹ UKEAT/0048/11/BI. See similarly *Hughes* and *South Manchester*. These cases were decided before *Focus Agency*, discussed below. It is not clear, however, that the outcome of the cases would be different if a ‘multi-factorial’ approach that focuses on how the contract defines work and pay is adopted.

imum wage to the extent that Regulations 16(1) and (1A) applied.⁴² This meant that she could not claim the minimum wage for time spent waiting for work beyond the workplace, or time when she was not 'awake for the purposes of working,' notwithstanding that the contract required that she make herself available to be called on during the entire night. She was not paid for employment, in other words, for the benefit of providing her services over time, but for 'work' as defined by the contract.

This approach was doubted by Langstaff J in *Whittlestone* (2014), later endorsed by the EAT in *Focus Care Agency* (above). Langstaff J argued that concepts such as 'on call' or 'core hours' are liable to mislead. He was happy with the distinction between people who are working by being present, and people who are not, but saw 'substantial difficulty' in accepting a distinction between 'core hours' and other hours in the contract. In Langstaff J's view, if a contract provides that hours are to be worked then they are working hours regardless of their classification as 'core' or 'non-core'.⁴³

Building on this, the EAT in *Focus Care Agency* argued that the courts should apply a 'multi-factorial approach' to determining whether the worker is to be treated as working merely by being 'available.'⁴⁴ This requires a close examination of the parties' contract, with particular emphasis on: (i) The employer's particular purpose in engaging the worker (ii) The extent to which the worker's activities are restricted by the requirement to be present and at the disposal of the employer (iii) The degree of responsibility undertaken by the worker and (iv) The immediacy of the requirement to provide services if something untoward occurs or an emergency arises.

This is closer to the functional approach advanced above, but it still rejects any active constituting role for the court. This is because these factors are only relevant, it seems, if the contract does not itself clearly define what counts as work for the purposes of the right to be paid. It has thus been confirmed that the *Focus Agency* test requires that the courts 'start with

⁴² This corresponds with what is today reg. 32(1).

⁴³ *Whittlestone* at [53].

⁴⁴ *Focus Care* at [44].

the contract.’⁴⁵ This is why, rather than deriving any general principles, the EAT was content to leave each case to turn on the terms of the individual contract, including how the contract provides for pay to be calculated. If the worker is *in fact* paid per shift, therefore, there will be a presumption that she is to be paid the minimum wage for the entire duration of each shift. If she is *in fact* paid by reference to tasks performed or time spent awake at the workplace, this would not be the case.⁴⁶ The courts will not, in other words, impose an obligation to pay if it is not clear from the broader factual matrix that the time in question was something for which the employer was willing to pay.⁴⁷ Indeed, the EAT in *Focus Agency* expressly endorsed the decision in *Walton*, which suggests that different principles are applicable to unmeasured work. In light of this, it may be that more employers, particularly in the care-sector where on-call night shifts are common, will take advantage of this provision so as to further limit the scope of their minimum wage obligations.⁴⁸

6.2.1 Defining the Boundaries Between Wages, Tips and Remuneration

The NMWA uses the term remuneration, rather than wages, to refer to the payments that count when it comes to determining whether the minimum wage has been paid. It is clear from the structure of the Act, however, and the link it establishes between the minimum wage and work, that it is with wages with which the Act is concerned. For this reason, the inclusion in the statutory definition of certain sums that are payable in connection with employment, but neither payable by an employer nor payable for labour, has proven particularly controversial. This is particularly so in relation to tips and gratuities, which until 2009 were expressly included within the remuneration that counts towards the minimum wage.

⁴⁵ *Abbeyfield Wessex Society Ltd v Edwards* (2017) Appeal No. UKEAT/0256/16/BA.

⁴⁶ *Focus Care* at [42].

⁴⁷ Following the EAT decision in *Focus Care*, HMRC began demanding back payments from the care sector in respect of similar sleep-in shifts. In response to outcries from employers, however the government temporarily suspended enforcement activity until November 2017, when it introduced the Social Care Compliance Scheme to ease the burden of paying back what was owed. See: <https://www.walkermorris.co.uk/publications/employment-briefing-november-2017/social-care-sector-hmrc-enforcement-underpayment-national-minimum-wage/>. Accessed 24th April 2018.

⁴⁸ *Focus Care* at [35]-[37].

Long recognised by the courts as part of a worker's contractual remuneration, tips would seem to fall outside the definition of the wage as a payment by an employer for labour. Consistently with this, tips were excluded from the definition of wages in the Truck Acts, and could not be considered as part of the minimum rates set by the Trade Boards because they were not deemed to be part of the price that an employer paid, or was required to pay, for 'personal labour'.⁴⁹ In contrast, tips had long been considered part of a workers' taxable earnings for the purposes of Income Tax legislation, the damages payable for breach of contract, and, during the 20th century, the 'earnings' to be considered when calculating compensation under the Workman's Compensation Acts.⁵⁰ Tips were thus something to which the worker was entitled, either by contract or custom, but not part of the exchange-value of labour.⁵¹

Prior to the 19th century, tipping had largely fallen outside the scope of wage and labour legislation,⁵² both as regards the 'vails' given by visitors to wealthy households to their host's servants by way of appreciation for extra services, and tips paid to waiters in tea and coffee houses as an incentive to better service.⁵³ This continued throughout the 19th century, at which time it had been common for proprietors of commercial establishments to charge members of the waiting profession for the privilege of working in their establishment.⁵⁴ By the end of the century, however, as the industry expanded, employers became increasingly concerned over their profitability and reputation and sought to exercise greater control over their waiters through their pay, replacing these customary arrangements with contracts for wages. Because they paid so little, however, the waiters continued to be highly dependent upon tips for their earnings.⁵⁵ In many establishments, moreover, waiters continued to 'pay the employers for their jobs,'⁵⁶ with employers imposing a number of fines and charges to reduce the sums that could be claimed.⁵⁷

⁴⁹ Truck Act 1831, s.25. See: HL Deb 03 June 1943 vol 127 cc 814-56, 823 and *Cofone v Spaghetti House Ltd* [1980] ICR 155.

⁵⁰ See: *Manubens v Leons* [1919] 1 KB 208 (claim for wrongful dismissal); *Blakistan v Cooper* [1907] 2 KB 688 (Easter offerings payable under an office taxable under Sched E Income Tax Act).

⁵¹ See Albin 2011, 193; HL Deb 03 June 1943 vol 127 cc814-56, 842.

⁵² Albin 2011, 190.

⁵³ On vails, see: Azar 2004; on tipping in tea and coffee houses, see: Mentzer 2013, 109.

⁵⁴ Catering Wages Commission 1945, 34.

⁵⁵ Albin 2011, 191.

⁵⁶ Catering Wages Commission 1945 at [16285] - [16288].

⁵⁷ Catering Wages Commission 1945 at [16285] - [16288].

Because waiters had long been seen as independent professionals engaged in the provision of a service, they fell outside the scope of the labour protection that was developing during this period to provide protection for (manual) workers' rights to be paid. In particular, they fell outside the scope of the Truck Acts, where such practices would have been forbidden as stoppages from wages. The first attempt to regulate tip-payments came in the Catering Wages Act (1943). This legislation was enacted with a view to remedying low pay in industries where tip payments were common and, because workers tended to be hired under customary/casual arrangements, it would prove difficult to do so through the frame of the contract of service or employment.⁵⁸ While those hired on a casual basis were excluded from the scope of the Wages Councils Act, therefore, the Catering Wages Act expressly included 'casual workers,' extending protection to occupations where tip-based pay was common, such as those of waiters, barmen and extra waiting hands. To achieve this, the legislation applied to workers employed in a catering undertaking, or when their work was performed due to an arrangement, express or implied, by way of trade.⁵⁹

The Catering Wages Act was intended to guarantee that employers would pay decent wages, rather than relying on customers or guests to cover the costs of labour.⁶⁰ In contrast with the Wages Councils Act, therefore, its primary concern was *who paid*, rather than what the worker received; in this particular industry, this question was deemed to lie at the heart of the problem of low-pay:⁶¹

'...a large number of those employed in hotels and restaurants receive no wages. Waiters, chambermaids, cloakroom men and porters sometimes receive a nominal 5s. a week, and sometimes nothing at all, and in some cases, they even pay for their position. Therefore, when we go to a hotel or restaurant and give a tip we are not handing something to the servants for special services which they have rendered to us but we

⁵⁸ Catering Wages Commission 1945.

⁵⁹ See also: Wages Regulation (Licensed Residential Establishment and Licensed Restaurant) Order 1948 - expressly including casual workers excluded from the scope of other wage-fixing legislation.

⁶⁰ HL Deb 03 June 1943 vol 127 cc814-56, 842, per Viscount Simon.

⁶¹ See the discussion in: HL Deb 20 May 1943 vol 127 cc 567-617.

are, in fact, contributing to wages which in other trades and industries would be paid by the employers.’⁶²

Parliament deliberately invoked the term wages to circumscribe the scope of the Board’s rate-setting powers, in order that the setting of minimum wages not influence worker’s tips. By (implicitly) excluding tips from the scope of the minimum rates, employers themselves had to pay their workers a minimum sum, regardless of how much they received in tips from customers. The Act’s purpose was thus to ensure that employers bore the full cost of labour, and so it left open scope for workers to receive tips as *additional* remuneration to complement their new legally guaranteed wages. For this reason, Parliament expressly distinguished wages and remuneration, confining the tips to the latter:

‘This is a Bill for the regulation of the payments to be made by an employer to his employee. A tip is not a payment made by an employer to his employee. It is a payment made by a third person to somebody else’s employee’⁶³

In *Wrottesley v Regent Street Restaurant* (1951) the court confirmed this interpretation of the Act.⁶⁴ This was so notwithstanding that the term remuneration appeared regularly throughout the legislation.⁶⁵ This term was only invoked because ‘there are certain deductions from wages which are authorised by s. 10 so that remuneration is an apt word to indicate the net payment.’⁶⁶ Here, the court argued that tips have long been deemed part of a worker’s ‘earnings’ for the purposes of income tax legislation, and part of the contractual remuneration considered as part of the compensation payable under the workman’s compensation legislation. They are thus sums to which, whether expressly or impliedly, the workers are entitled. Most often paid directly in cash by a customer to the worker, moreover, they were the worker’s

⁶² HC Deb 05 February 1937 vol 319 cc2011-22, 2012, per Mr Holmes.

⁶³ HL Deb 20 May 1943 vol 127 cc567-617, 598-9 per Lord Nathan.

⁶⁴ *Wrottesley* [1951] 2 K.B. 277, 283.

⁶⁵ Sections 8, 9 and 10. But sections 8(1) and 10(2) make it clear that the term corresponds with the technical concept of the wage.

⁶⁶ *Wrottesley*, 283.

property and so could not be used by the employer to discharge his minimum wage obligations because they could not be said to be paid *by* him to his worker.⁶⁷

By the time *Nerva* was decided in 1990 the custom of paying tips in cash was in decline.⁶⁸ Rather than providing workers with a right to retain cash-tips, employers sought to recoup those tips themselves by imposing service charges that were due as part of the bill. This situation was exacerbated because cheques and credit card payments were becoming more common, so workers would rarely receive cash tips in hand.⁶⁹ Despite the court's assumption in *Wrottesley* that workers would go on receiving tips as a supplement to their guaranteed wage, therefore, there was no longer much scope for workers to be able to claim tips *in addition* to the minimum wage.

In *Nerva*, consistent with the principle, albeit not the spirit, behind the decision in *Wrottesley*, the court argued that if tips paid directly to workers are the workers' property, the same must be true of tips paid directly to the employer. If he used such sums to pay his worker, therefore, they were a payment by him to his worker and so would go towards discharging his minimum wage obligations.

In *Nerva*, between 1983 and 1986, the employer fell within the jurisdiction of the Wages Councils Act (1979) and between 1986 and 1989, the Wages Act, rather than the Catering Wages Act as in *Wrottesley*. Engaging with the conflicting statutory language, the use in the Wages Councils Act of the term 'remuneration,' and in the Wages Act of the term 'wage', the court argued that there was no longer any meaningful distinction to be drawn between them: each referred to a compulsory payment made by an employer to his worker. Notwithstanding the use of the term remuneration therefore, both the Wages Councils Act and the Wages Act were said to be concerned with what the employer paid his worker, rather than what the worker received by way of remuneration for employment.⁷⁰

⁶⁷ *Wrottesley*.

⁶⁸ *Nerva v RL&G Ltd* [1997] ICR 11.

⁶⁹ *Nerva*, at [22]-[23].

⁷⁰ *Nerva*, 14.

Like the court in *Wrottesley*, Straughton LJ pointed out that although the Catering Wages Act used the term remuneration, it was clear that it was concerned with payment by an employer to a worker - which, in the context of the Wages Act at least, was exactly what was meant by the term wage. The wage was no longer simply the price of labour, it seemed, but the price payable under a contract between a worker and his employer - hence the blurring of the lines between remuneration and wages. The difference was no longer to be drawn by reference to the subject matter of the contract, therefore, by reference to that for which the payment was made, but instead by reference to who paid. This made it possible to assimilate the legal protections provided in what had been very different models of minimum 'wage' protection.

As explained in Chapter five, the term remuneration had been deliberately invoked in the Wages Councils Act, as something that is payable for employment, as opposed to something that reflects the price of labour. Parliament argued in favour of the term because it ensured workers not just a right to be paid for work, but a guaranteed minimum weekly income that attached to stable employment.⁷¹ By re-framing the distinction between the concepts in terms of *who pays*, however, the court in *Nerva* assimilated the purposes of the Catering Wages Act and the Wages Council Act: to ensure that the employer rather than the public bore the direct, or private, costs of labour. The distinction between that which is payable for work, and that which is paid for ongoing service had thus been lost, and with it, the distinction between wages and remuneration.

The effect of this interpretation in *Nerva* was to leave employers free to provide workers with a right to tips if they wished, but to leave them equally free to claim tips for themselves and to use these sums to discharge their minimum wage obligations. It is this that came to be reflected in the NMWA: tips other than those paid in cash directly to the worker can be considered part of the remuneration payable as part of the minimum wage.

⁷¹ HC Deb 16 January 1945 vol 407 cc69-116, particularly 73-6, per Mr Bevin.

In 2009, the NMWR was amended to exclude from this tip-payments made via a tronc system.⁷² The purpose of this was to better protect customer expectations, to 'empower customers through clear information on what happens to the service charge, tip or gratuity when they leave.'⁷³ It was a response to employers' attempts to use tronc systems to avoid PAYE obligations, leaving it unclear to customers how their tip payments would be used.⁷⁴ The amendment did not change the basic position where the employer recoups tips in the form of a service charge, or when tips are paid directly via cheque or credit card. These would still be deemed part of the employers' property and thus the fund from which he was entitled to pay wages.⁷⁵

The 2009 amendment is entirely consistent with the policy behind the NMWR and the Wages Act more generally: to guarantee that employers, rather than the public, bear the full private costs of labour. In form, the position is the same as that which obtained under the Catering Wages Act. In practice, however, the effect is quite different. The Catering Wages Act had been enacted in a context in which the practice of paying workers cash-tips was so widespread that it could be assumed that workers would continue to receive tips in addition to their wages. By the 1990s, however, this was no longer the case.⁷⁶ This has been further exacerbated by changes in the way in which the courts approach questions of employment status (explored in more detail in Chapter seven). Workers hired in industries in which tip-based (but not cash-based) pay has long been common are often hired on a casual basis, and today struggle to establish the employment status and/or the continuity of service that is a condition for protection under labour and wage legislation. For such workers, therefore, the minimum wage has (at best) come to express the limit of what they can expect to receive by way of income from employment.⁷⁷ Taken in the broader context of the tax and social security system in which it is embedded, this falls far short of anything resembling a subsistence wage.

⁷² This did not affect the position in Part I Employment Rights Act (corresponding with Part I of the Wages Act 1986), however, where tips continue to be part of the 'wages' to which the provisions on itemised pay statements and deductions apply.

⁷³ Department of Business Innovation and Skills 2009, 4.

⁷⁴ It was partly a response to: *Revenue and Customs Commission v Annabel's (Berkeley Square)* 2009 ICR 1123.

⁷⁵ Elliott 2009.

⁷⁶ HC Deb 16 December 1997 vol 303 cc162-239, 165, per Mrs Beckett.

⁷⁷ See particularly: *O'Kelly v Trusthouse Forte PLC* [1983] ICR 728.

6.3 Conclusion

The legal framework governing deductions from wages, tax-credits, and the NMWA and NMWR all rest on the same basic ontological premises: the law has no role to play in shaping employment practices, in imposing an obligation to pay that alters the parties' incentives, encouraging employers to offer more stable, regular employment if they are to avoid being driven out of the market. By helping to reveal these premises, and exploring how they shape how labour law is developing, the previous two chapters have gone some way towards explaining why labour law struggles to provide for wage security today.

Since the 1980s, the policy underpinning minimum wage regulation in English law has been played out through the changing relationship between statutory minimum wages, and tax-credits. Prior to 1998, in the absence of a statutory minimum wage, subsistence costs were to be born not by employers, but by the state through a system of wage supplements and tax-credits. The introduction of the statutory minimum in 1998 did little to change this: the minimum wage was aimed more at correcting market distortions than it was at shifting social costs onto employers. For this reason, the tax credit system continued to bear most of the weight when it came to topping up wages to subsistence level.

This chapter has shown that these ideas are reflected in the NMWA's conceptual structure, and the distinction it draws between 'employment', as a condition for claiming the minimum rate, and 'work' as that for which workers are entitled to be paid, and the deference it affords to employers when it comes to their choice of payment system. Little attempt has thus been made to prevent employers from using the contract and its definition of 'work' to shift economic risk onto workers.

The shift in policy from 1998 to today should not be under-estimated; while during both periods, the conception of the wage at the heart of the NMWA was a market wage that corresponded with the price of a commodity, prior to the more recent reforms, there was at least a tax credit system in place that was expressly designed to top-up that wage to subsistence lev-

el. True, as this thesis has argued, this itself is not conducive to long-term stability and efficiency. But it did at least take seriously the need to provide for the subsistence needs of working households. The premises on which Universal Credit is built, however, are quite different. Rather than acting as a bridge between wages and workers' subsistence needs, the tax-credit system is more explicitly tailored with a view to providing incentives to work – however irregular, short-term, or precarious that work may be. While the NLW does suggest that ideas about the subsistence wage are resurfacing, the aim that the NLW embodies is unlikely to be achieved in practice. This is due to the wider changes being made to Universal Credit, further casualising work; the absence of any weekly or monthly minima, and, as has been shown in this chapter, the fact that the NLW is being given effect through the same conceptual structure as the NMW. If the broader institutional environment remains hostile to stable employment, promoting casualization, increases in the minimum rate alone will do little to help many of the lowest paid.

The next chapter will show that the failure of the minimum wage framework to provide for workers' subsistence needs has been further exacerbated by the courts' approach to questions of employment status. It will show that because the courts see their role as a passive reactive one, rather than an active constituting one, there is little room today for providing stability and protection to the growing numbers of casual workers unable to secure themselves regular and continuous employment. Combined with the structural limits embedded in minimum wage legislation, the effect of this is to severely limit labour law's capacity to secure workers a subsistence wage.

CHAPTER SEVEN

Minimum Wages and Employment Status

7. Introduction

This chapter will show that exploring the case law on employment status through the prism of the right to wages can enhance our understanding of the status issue, shedding new light on what continues to be a very heavily researched question. This, in turn, can provide new insights into law's view of its relationship with social reality – the extent to which we find implicit in juridical language the idea that law has a role to play in actively shaping employment practices, as opposed to the belief we find in the Taylor Review, that its task is to simply '*adapt to reflect* current business models.'¹

Previous chapters have shown that there is an important difference between a court that sees its role as enforcing the agreement the parties have made, and a court that recognises that the law plays an important role in shaping that agreement, and as such, the labour relationship itself. The first perspective leads the court to take a passive role, taking formal contracts at face value, prioritising the express terms of the agreement over terms implied by law or conduct. The second perspective sees the court as having a more constitutive role in defining contract types, implying contracts from conduct and reading implied terms into the contract as necessary incidents of employment status in order to further labour law's socio-economic function. Thus, while the passive ontology tends to narrow the scope of protective legislation and enhance the opportunities for creative avoidance through drafting, the constitutive ontology facilitates a functional approach to questions of employment status. This increases the scope for labour law to secure a subsistence wage because it matches labour rights, not to a specific contractual form, but to relationships that arise when one party has provided the other with their labour.

¹ Taylor 2017, 31.

These contrasting positions lead to two different interpretations of the concept, or test, of mutuality of obligation and two different views as to the distinction between ‘workers’ and ‘employees’. To take the passive approach is to see workers and employees as distinct classes of person with distinct sets of legal rights and obligations which it is for the legal system to identify and enforce. From this perspective, mutuality of obligation is something that describes the structure of a particular contract-form which may be freely adopted by the parties. To take the active, constituting, approach, by contrast is to see workers as persons who sell their labour for wages, and employees as the form in which they appear in law in order that they might enjoy the stability and protection that the abstract idea of employment, as something envisaging mutual rights and obligations, implies.

This chapter will explore mutuality of obligation and the distinction between workers and employees from an historical perspective, exploring the link between mutuality of obligation and medieval ideas of mutuality and tenure, and how these relate to the concepts of employee and worker. It will argue that although the medieval concepts of tenure and mutuality no longer form part of modern labour law discourse, the ideas that they reflect have never gone away. Embedded in labour law, but obscured by more recent developments, is a deeply rooted idea that an employer’s rights to service is conditional upon his obligation to provide for the worker’s subsistence. By reviving these ideas, and thinking about how they might be applied to a modern context, it might be possible to overcome some of the constraints inherent in the way in which mutuality of obligation is currently conceived, clarifying the distinction between workers and employees, and better securing those who provide their labour to others a subsistence wage.

This chapter will begin by exploring how mutuality of obligation is currently conceived. It will then seek to shed light on the confusion that plagues the case law in this area by tracing the evolution of these ideas to their origins in medieval ideas of tenure and mutuality. This will then be drawn upon to shed new light on the problems facing labour law today when it comes to questions of status.

7.1 Mutuality of Obligation Today

The term ‘mutuality of obligation’ is used in two different senses in the case law today. The first sense refers to the requirement for consideration; there must be a contract of some type between the parties before the question of employment status even arises, an ‘irreducible minimum of obligation’ on both sides. Mutuality of obligation in the second sense, by contrast, refers to the idea that there is something distinctive about employment relationships that distinguishes them from a basic exchange of work for wages.

The idea of mutuality as consideration is reflected in McKenna J’s judgment in *Ready Mixed Concrete*: ‘There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration, no contract of any kind.’² Nonetheless, there is considerable disagreement concerning the nature of this irreducible minimum of obligations, for ‘sometimes the employer’s duty is said to be to offer work, sometimes to provide pay.’ Nonetheless, it seems that

‘The critical feature...is that the nature of the duty must involve some obligation to work such as to locate the contract in the employment field. If there are no mutual obligations of any kind then there is simply no contract at all, as *Carmichael v National Power plc*³ makes clear; if there are mutual obligations, and they relate in some way to the provision of, or payment for, work which must be personally provided by the worker, there will be a contract in the employment field.’⁴

The next section will show that mutuality in the consideration sense has long been a condition for establishing employment status, in the sense of being a condition to an entitlement to wage and labour protection. It is reflected, for example, in the requirement for ‘quid pro quo’ in claims for wages in the 14th and 15th centuries, and for a ‘lawful hiring’ in the context of the Poor Law (see below). Historically, this has required proof that labour (power), rather

² *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance* [1968] 2 Q.B. 497, at 515.

³ *Carmichael v National Power plc* [1999] ICR 1226.

⁴ *James v Greenwich LBC* [2007] ICR 577, 581.

than a contracted for result or task, has been provided pursuant to some form of reciprocal exchange transaction. The focus of the tests employed by the courts was thus on the nature of the rights enjoyed by the employer, and the socio-economic position of the worker. The added requirement for ‘mutuality’ simply referred to the fact that purely gratuitous transactions would not fall within the purview of the law. In the presence of a written contract, this would be readily implied, but even in the case of informal (oral) contracts, evidence that labour had in fact been provided in expectation of some benefit would have been sufficient to establish the existence of a legally binding arrangement. This would then have provided sufficient ‘mutuality’ to ground a right to statutory, or reasonable, wages.

In recent years, however, particularly in the Higher Courts, the causal flow has been reversed. Rather than the *obligation* to pay wages being implied from the provision of labour, this obligation will only exist if the parties provide for it in their contract. The EAT in *Stack v A-Jar-Tec Ltd* (2013) concluded, for example, that the fact that there was no express provision for remuneration meant there was no consideration, and as such, no contract of employment into which a right to remuneration could be implied.⁵ This was so notwithstanding the finding that the individual had agreed to provide his personal services to the company and had in fact done so for a considerable period of time.

Stack v A-Jar-Tec involved a company director. The decision of the EAT on this point was overturned on appeal. The Court of Appeal argued that ‘the EAT had overlooked that the process of contract formulation might be partly express and partly by implication. It was not fatal to the existence of a concluded contract that the directors had not expressly agreed a term concerning remuneration.’⁶

The courts have taken a less favourable position, however, towards low-paid casual workers engaged in personal service industries in which rather than being paid a regular wage, they instead receive an ‘opportunity’ to earn tips or fees from third parties. The problem here is that because the express consideration under the contract does not take the form of a right to

⁵ *Stack v Ajar-Tec Ltd* (2013) UKEAT/0293/13/DA.

⁶ *Stack*, at [30].

wages, the courts refuse to imply an obligation to pay wages that would contradict the obligations to which the employer has freely agreed. If the employer does not offer to pay a regular wage, therefore, the contract will lack the ‘irreducible minimum of mutuality’ to establish the existence not of a contract *per se*, but a contract *relevant to the employment field*. By implication, the fact that there is no express promise to pay wages will prevent the worker from claiming any *right* to wages as a result of having provided, for example, the benefit of their personal service pursuant to some form of reciprocal exchange. This is the approach we see in cases such as *Hong Kong Golf Club* and *Quashie* (see below).

This approach shifts the focus of the enquiry away from the question of whether *labour* has been provided, as opposed to a job or task, towards the form of the contract. The question is not whether labour has been provided in expectation of some reciprocal benefit, therefore, but whether the contract imposes on workers an obligation to provide services personally, and on employers an obligation to pay monetary remuneration.⁷ This goes against the trend of the early 20th century cases, as epitomised in Lord Shaw’s warning in 1916 that:

‘It would be a strange answer to this absolute obligation to pay a minimum wage to his servant that the employer should say “This statute cannot apply to me because I have done better than give him less than the minimum wage: I have bargained to give him no wages at all.”’⁸

This is, however, the effect of the majority decision in the *Golf Club* case, for example, and the Court of Appeal decision in *Quashie*.⁹ In the latter, the Court of Appeal argued that a contract that required a dancer to perform a minimum number of evenings per week in the ‘employer’s’ club in exchange for an opportunity to earn fees from its clients lacked the type of

⁷ On the requirement for personal service, contrast the judgement of Sir Terence Etherton MR, agreeing with Counsel for Pimlico Plumbers (PP), *Pimlico Plumbers v Smith* [2017] EWCA Civ 51, that whether or not Mr. Smith undertook personally to do work for PP depended entirely on the terms of the contract (as opposed to what happens in practice), with that of Underhill LJ (at 127). See also: *Redrow Homes (Yorkshire) Ltd v Wright* [2004] EWCA Civ 469 and *Premier Groundworks Ltd v Jozsa* [2009] UKEAT/047/08; *Echo Publications Ltd v Tanton* [1999] ICR 693, 64.

⁸ *Churm*, 634. See also Lord Parker, 643.

⁹ See also *Pimlico Plumbers v Smith Appeal* No. UKEAT/0495/12/DM, [40].

mutuality of obligation that is characteristic of employment (as compared with self-employment). The 'most important finding' in this respect was that there was no *express* contractual obligation to pay,¹⁰ and there was 'nothing inherently implausible in the finding ...that the club was obliged to pay nothing...it is what the terms of the agreement say, and the judge found that it was [the dancer's] understanding...Since ...there is no mutuality of obligation, which is an essential element of the contract of employment...the Claimant was not an employee of the Respondent on a continuing basis or by *separate contracts* but was self-employed.'¹¹

Establishing mutuality in this basic consideration sense is only the first hurdle. This is clearly a requirement for both worker and employee status for it goes to the question of the existence of the contract by which labour is provided. The essence of any relationship in the employment field, whether worker or employee, is said to be the existence of a contract to do work personally (subject to the proviso that.... (etc.)) and this presupposes a legally binding obligation to provide labour as opposed to a completed job or task. Nonetheless, to prove that that contract to do work personally is a contract of employment, mutuality in what this thesis will refer to as the 'relational' or 'continuity' sense, must also be proven. That is, the relationship must be one that envisages ongoing obligations of future performance, an obligation *on the worker* to provide his labour on an ongoing basis. Today, this is encapsulated in the idea that the employer must promise to provide work, and the worker to accept it, on an ongoing basis.

This 'relational' conception of mutuality is broadly consistent with Mark Freedland's 'secondary tier' of mutuality of obligation, in the sense of mutual promises of future employment. In Freedland's work, however, mutuality in this *secondary* or 'relational' sense is not a *test* for establishing employment status, but something that is *ascribed* to employment relationships so-established:

'where there is such an exchange or a series of exchanges of work and remuneration taking place in the context of a personal work relationship, the employer or employing

¹⁰ *Quashie v Stringfellow Restaurants Ltd* Appeal No. UKEAT/0289/11/RN; [2012] EWCA Civ 1735 (CA) at [46].

¹¹ *Quashie* (CA) at [48].

enterprise and the worker *should* be regarded and treated as being committed to reciprocal co-operation in the conduct of that contractual relationship ('the reciprocity principle').'¹²

From this perspective, an approach that characterises much of the pre-1970s case law, mutuality of obligation is not so much a test for establishing employment status, as a general idea about the way in which the labour relationship should, and has historically been, constituted in law. Mutuality of obligation is not a reality that the courts can identify, but a juridical idea, the idea that the parties' mutual expectations as to the worker's ongoing service *should* be expressed in law in a particular form, today as a contract of employment in which certain standard mutual rights and obligations are implied.

In *Airfix Footwear* (1978), for example, the EAT suggested that 'where work is done consistently over a substantial period a tribunal would be entitled to reach the conclusion that a contract of employment had been created between the parties'.¹³ Similarly, in *Nethermere*, Slynn J stated 'I cannot see why well founded expectations of continuing homework should not be hardened or refined into enforceable contracts by regular giving and taking of work over periods of a year or more' with the result that 'outworkers... might become...employees under contracts of service.'¹⁴

In contrast to this approach, the more recent tendency has been for the courts to adopt one of two positions. In the first, they invoke the term mutuality of obligations expressly in order to refer to the idea of continuity, or ongoing performance, as an essential feature of, or condition for, a contract of employment. From this perspective, even evidence of a wage-work exchange and the presence of control will not be sufficient to establish a contract of employ-

¹² Freedland 2016, 46.

¹³ *Airfix Footwear Ltd. v. Cope* [1978] ICR 1210, quoted in *Nethermere (St Neots) Ltd v Gardiner* [1984] I.C.R. 612, 630 per Kerr J.

¹⁴ *Nethermere*, 628. See also: *Greig and Others v Insole and Others* [1978] 1 WLR 302, 326 'where a contract of employment by its terms imposes on an employee a binding obligation to work, without expressly imposing on the employer a corresponding obligation to provide work, the court will in an appropriate case readily imply such an obligation on the part of the employer, if it is satisfied that such implication is the proper way of giving to the transaction the business efficacy which both parties must have intended it should have.' For a more recent example, see: *Drake v Ipsos Mori UK Ltd* [2012] IRLR 973.

ment during periods of work, if there are no express obligations to provide and accept work on an ongoing basis.

For example, the Court of Appeal in *O'Kelly* suggested that 'mutual obligations are a crucial prerequisite of a contract of service [because] a contract of service is a continuing relationship between employer and employee;' intermittent performance of work is inconsistent with [there being] *continuing obligations*'¹⁵ In *Stevedoring & Haulage*, therefore, it was argued that where the contract 'expressly negatives mutuality,' or expressly states that the work is to be casual, or denies any obligation to provide or accept a minimum amount of work, there will be no contract of employment.¹⁶ This means that even a 'lengthy course of dealing' will not '...somehow convert itself into a contractually binding obligation...to continue to enter into individual contracts' sufficient to establish a contract of employment if there are no express contractual obligations to provide and accept work on an ongoing basis.¹⁷

These decisions have been followed in a number of cases involving claims by agency and/or casual workers to statutory employment rights.¹⁸ They have thus posed considerable hurdles to those hired under zero-hours contracts, through employment agencies and/or to perform gigs or shifts when it comes to claiming basic employment protections. In these cases, it is assumed that 'even where the work-wage relationship is established and there is substantial control, there may be other features of the relationship which will entitle a tribunal to conclude that there is no contract of employment in place even during an individual engagement.'¹⁹

In the second approach, reflected in another line of cases, although the term mutuality of obligation is expressly invoked as an essential element of a contract of employment, its primary function has been to determine whether the contract is a short-term one envisaging a single

¹⁵ Described in *Nethermere*. The EAT in *O'Kelly* rejected the argument that the workers were individual contractors on the grounds of a lack of 'mutuality of obligation', but this position was reversed on appeal.

¹⁶ *Stevedoring & Haulage Services Ltd v Fuller* [2001] IRLR 627 at [10].

¹⁷ *Nethermere*, per Kerr J (dissenting), 630. This approach was recently endorsed by the EAT in: *Addison Lee Ltd v Gascoigne* UKEAT/0289/17/LA

¹⁸ *Carmichael; James*.

¹⁹ *Quashie* (CA) at [14].

shift, or an ‘umbrella’ contract envisaging ongoing performance.²⁰ This is important because many employment rights can only be claimed by employees who have a specified period of continuous service. In this context, a lack of mutuality will not *necessarily* prevent a finding that there is a contract of employment when work is being provided.²¹ However, if the contract does not establish an obligation to maintain that relationship in being between shifts, the courts will not imply an ongoing or ‘umbrella’ contract in order to provide workers with more stable and continuous employment, a contract that bridges the gap between engagements.²² Even if an individual is an employee while working, therefore, their contracts are effectively treated as being *lawfully* terminated (without notice) at the end of each shift, preventing them from establishing the necessary continuity of service required to claim those very employment rights designed to provide the stability and security they are de facto denied.

From the perspective of the worker’s right to be paid, this latter interpretation of mutuality would provide access to statutory protection for the right to be paid wages for labour actually provided, but would not go as far as to transform this right into a contractual right to be remunerated for time in employment. There being no binding executory obligations underpinning the relationship between engagements, the conditions for claiming rights to sickness and maternity pay, for example, or a statutory right to notice capable of providing more stable employment, would not be established.

It is only in very few cases that the courts have recognised that where there is a contract of employment ‘for individual assignments - a casual employee may have worked so regularly and for such a period as to acquire continuity under these provisions. Such an employee will, to the eyes of anyone other than an employment lawyer, scarcely appear casual anymore; and it is not inherently surprising that such an employee should acquire employment rights.’²³ The willingness of the courts to disregard ‘no mutuality’ clauses (an ‘*Autoclenz*-style’ sham) will, moreover, depend on how far the written terms can be said to reflect the *real agreement*

²⁰ *Carmichael; Clark v Oxfordshire Health Authority* [1997] EWCA Civ 3035.

²¹ E.g. *McMeechan v Secretary of State for Employment* [1997] ICR. 549 ; *Cornwall County Council v Prater* [2006] EWCA Civ 102.

²² *Hellyer Brothers Ltd v McLeod* [1987] 1 WLR. 728; *Carmichael; Clark*.

²³ *Drake* at [27].

between the parties.²⁴ Thus, if the employer has no intention of providing regular work and the worker has no choice but to accept casual employment, the courts will not imply such an obligation to protect a reasonable expectation on the worker's part to be provided with a stable, and secure, income.²⁵

This short discussion of the mutuality concept and the various guises in which it appears today, highlights that there is considerable confusion, and tension, in the way in which that concept is conceived. This is due in part to the co-existence of competing ontological positions within and between the courts. The difference between the decisions in *Nethermere*, *Airfix*, *Stack* and the EAT in *Quashie*, and cases such as *O'Kelly*, *Stevedoring & Haulage*, the EAT in *Stack* and *Quashie* (CA), is two different ontological positions, two different views as to the relationship between law and the social reality of employment. From one perspective, 'mutuality of obligation' is an idea that is implicit in the way in which the labour relationship is conceived in law. This is the approach we see in cases such as *Nethermere* and *Airfix*. Rather than referring to a prior reality, the express terms of the parties' agreement, it is something that arises as a consequence of the contract of employment that the courts imply in order to shape the relationship that the wage-work exchange establishes. From the alternative perspective, by contrast, the contract of employment is itself constitutive of the labour relationship, a prior reality to which the courts must respond. Mutuality of obligation is thus something that describes the particular contractual obligations that parties to such a contract agree, and which, as a result, renders them subject to labour rights and obligations. This is what we see in cases such as *O'Kelly*, *Stevedoring & Haulage*, and *Quashie* (CA); if ongoing obligations are not established by the agreement there are no rights or obligations for the legal system to enforce, and thus nothing to which labour law can apply.

The rest of the chapter will trace the evolution of the two different conceptions of mutuality, in the 'consideration' sense and in the 'relational' or continuity sense, and their relationship to the concepts of employee and worker. The purpose of this is three-fold. First, to clarify some of the confusion that we see in the case law (above), second, to shed light on the con-

²⁴ *Autoclenz v Belcher* [2011] UKSC 41

²⁵ This can be contrasted with the earlier decision in *Devonald*, discussed in Chapter 4.

flicting ontological positions that this confusion reflects, and third, to show how clarity might be achieved today by drawing on some of the medieval ideas that are deeply embedded within the modern conception of mutuality of obligation.

7.2 The Historical Evolution of 'Mutuality of Obligation'

7.2.1 Pre-19th Century

From the 14th century, service was compulsory for all those without alternative means of subsistence. The contract by which dependent persons provided their service was something that was imputed from that person's dependence, with the obligation to serve, and the right to wages it established, something that was implied through that contract as a result of the statutory regime. If a person undertook work on a casual day-to-day basis therefore, it was implicit that they were not dependent in the same sense as were servants; had they been, they too would have been compelled to serve.²⁶

During this period, the corollary to the legal obligation to serve was the right to be maintained by one's master. For this reason, only those with sufficient land to support their servants were entitled to compel a servant into service.²⁷ Employers' rights to service, like Lords' to the service of their villeins thus came to imply an ongoing right to subsistence, associating with the concept of service certain relational ideas of mutuality of obligation.

In the 16th and 17th centuries, and even up to the middle of the 19th, the courts had to elaborate upon the meaning of service given the central role that it played within the framework of the Poor Law. During this period service was not only something that was mandated for those

²⁶ (1364) YB Trin. 38 Edw. 3, fl 12b, pl.1. 'He did not have sufficient land to have a servant, but was a serving man himself'; (1426) YB Pasch. 4 Hen 6, fl. 19b, pl. 5.

²⁷ (1364) YB Trin. 38 Edw. 3, fl 12b, pl.1.

with insufficient means, imposing on employers an obligation to maintain and protect, but something that imposed on the Parish similar obligations in times of unemployment.²⁸

The Poor Relief Act 1691 provided that ‘if any unmarried person shall be lawfully hired into any Parish or town for a year, such service shall be deemed and adjudged a good settlement therein.’²⁹ This meant that both a lawful hiring envisaging a year's service, and a year's actual service, would have to be proven to establish a settlement.

In relation to the need to prove service, Chapter three has shown how this was associated with proprietary ideas linked with leasehold, exclusive control over the servant for the duration of the hiring. Implicit in this was the servant's complete subordination to the employer's command, and thus his inability to refuse to work as and when required. These obligations were ‘mutual’ to his right to be maintained, however, in the sense that the employer's failure to provide adequate food and board would provide a good defence to an action for departure.³⁰

In relation to the Statute's requirement for a lawful hiring, the courts interpreted this as requiring that service had been provided pursuant to a reciprocal and enforceable contract.³¹ Even so, the courts readily implied such a contract from evidence of service (as executed consideration). The issue was only problematic, therefore, where the contract was made by a minor and/or a servant already bound into the service of another.³² For questions of status, the courts thus placed greater emphasis on the parties' conduct, and the scope of the employer's control, than they did on the terms of any express agreement.

²⁸ Prior to 1691, while outdoor relief was a Parish function, service was not given as an express statutory basis for claiming a settlement. See earlier legislation: (1530) 22 Hen VIII c 12; (1535) 27 Hen VIII. c 25; (1597) 39 Eliz 1 c 4; (1601) 43 Eliz 1 c 2; (1662) 14 Cha. II, c 12 (Settlement Act).

²⁹ (1692) 3 & 4 W. & M, c.11, s7.

³⁰ In 1354, the court confirmed that a failure to provide livery constituted a good defense in an action for departure: (1354) YB Mich. 28 Edw 3, fl. 21B, pl 18. In turn, a person without sufficient land of their own were not permitted to retain a servant under the statute: (1364) YB Trin. 38 Edw 3, f. 12b, pl 1. See also: Burn 1838,789 and Burn and Burn 1805, 246-7.

³¹ See, for example: *R v The Inhabitants of Beaulieu* (1814) 105 E.R. 595; 3 M. & S. 229, 235-6.

³² *The Parish of Anny Cruis v Barnsly* (1721) 88 E.R. 1092; (already apprenticed to another); *R v The Inhabitants of Chesterfield* (1701) 88 E.R. 1215 (no valid contract as no mutual consent).

The courts took a similar approach when it came to claims for wages. Informal contracts only being actionable in debt, it had long been the case that the basis for the claim to wages was the entitlement, rather than the promise to pay.³³ It was thus proof of service, the exchange transaction, rather than the contract itself, that provided the basis for the claim.³⁴ Even in the 16th century, as *assumpsit* came gradually to replace debt as the main mechanism for the enforcement of informal agreements, the courts would imply a promise to pay from the fact of service, for it was the exchange itself, the transfer of value, that provided the basis for the obligation to pay wages.³⁵

Prior to the 19th century, therefore, we can identify two distinct *ideas* associated with the concept of mutuality. The first refers to the basic idea that the courts are only concerned with transactions of a legal nature. In a context in which written contracts were rare, this required evidence that labour had been provided pursuant to some form of reciprocal exchange. Given that for most labour was compulsory, however, and wages provided by statute, such would be readily inferred from evidence of service. This depended upon the nature of the relationship between the parties, and the degree of the servant's dependence.

The second idea of mutuality reflects ideas about the nature of the labour relationship, a particular form of property relationship that envisages ongoing rights to personal service. In this context, the concept expresses the premise that an employer's right to service *ought to be* made conditional upon his securing the servant a right to subsistence. Rather than require the employer to keep his worker employed, providing him with regular work, the courts instead imposed an obligation on the employer to maintain and protect him for the entire period of the hiring, irrespective of how much work was performed. Mutuality of obligation was not something that the courts sought to identify, therefore, nor a test used to determine the scope of social legislation, but a distinctive idea about the nature of the labour relationship and the way it should be constituted in law when it came to questions of enforcement. It was, in other words, the product of, rather than the condition for, labour law rights and obligations.

³³ Hall 1993, X.3-5; Ibbetson 2001, 19; See also, Fifoot 1949, 249; *Alice's Case*.

³⁴ On what had to be proven in debt, see: (1472) Pasch.12 Edw 4, fl. 8, pl.22. See: Ibbetson 2001, 39. On this latter point, see Simpson 1987, 48.

³⁵ Ibbetson 1982, 153; Ibbetson and Barton 1990.

7.2.2 The 19th Century

In the 19th century, these distinct ideas of mutuality continued to play a role in determining the scope of labour legislation. In the context of the Truck Acts, mutuality in the primary ‘consideration’ sense continued to require as a condition for wages proof of actual performance; that labour had actually been provided pursuant to some form of reciprocal exchange. Evidence of reciprocity still being readily inferred where some form of benefit had been provided pursuant to an ‘Agreement, Understanding, Device, Contrivance, Collusion, or Arrangement whatsoever on the Subject of Wages’³⁶ the emphasis was less on the form of the contract, or the relationship between the parties, than it was on whether what had been provided was in fact labour, rather than some concrete task or job.

The Act defined the ‘wage’ as ‘any Money or other Thing had or contracted to be paid, delivered, or given as a Recompence, Reward, or Remuneration for *any Labour done or to be done...*’ and applied to all Artificers, ‘all Workmen, Labourers, and other Persons in any Manner engaged in the Performance of any Work, Employment, or Operation, of what Nature so ever, in or about the several Trades and Occupations aforesaid.’³⁷ This meant that questions of scope turned primarily upon whether the payment could be classed as a wage that was payable for labour ‘done or to be done’ rather than a price to be paid for a contract:

‘[The Act] applies only to those persons who are to receive wages as the price of their labour, and that the term ‘wages’ is to be understood in its popular sense, and does not include wages which are the price of a contract’³⁸

The focus of the case law was thus upon whether the parties intended that the worker provide his services personally, and thus that he provided labour, rather than promising to secure the

³⁶ Section 25.

³⁷ Section 25.

³⁸ Riley, 69 per Rolfe B.

completion of a specific job or task. This meant that it was only if ‘the nature of the contract is such that it is not a contract for labour but the result of labour [that] the case is not within the Act[.]’³⁹ Despite a much more restrictive reading towards the end of the 19th century, quickly reversed by the legislature⁴⁰, for the most part, the courts’ approach was to look at ‘the nature of the work, the contract and position of the parties’ and derive from this the terms of the contract.⁴¹ This was because the courts assumed that ‘the legislature intended to protect a particular class’ such that all these factors would have to be considered to ‘say whether [an individual] was of that class.’⁴² Thus, while it was necessary that there be a contract to personally do work, the terms of that contract were *implied* from the nature of the work and the socio-economic status of the parties.⁴³ Mutuality in this context merely reflected the idea that where labour was provided it would readily be presumed that it was provided pursuant to a reciprocal exchange transaction, thereby triggering the legal right to be paid.

Mutuality played a different role, however, in the context of the Master and Servant Acts. The Acts presupposed ‘service’ such that while it applied to servants in husbandry and ‘artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters and other labourers employed for any certain time, or in any other manner’⁴⁴ it provided masters with a remedy in the event of a departure from service, and imposed criminal penalties for desertion of work. It thus envisaged not only an exchange of commodified labour for wages, but ongoing service, an obligation to provide labour to one master exclusively on an ongoing basis.⁴⁵

To avail himself of the ‘protection’ under the Acts, the *employer* had to prove that there had been more than an exchange of labour for wages, that he had promised to provide work in exchange for the service which he sought to compel.⁴⁶ If no such promise existed, the claim

³⁹ *Sleeman*.

⁴⁰ Truck Act 1887, s.10.

⁴¹ *Bowers v Lovekin* (1856) 119 E.R. 982; 6 El. & Bl. 584, 591 per Erle J. Contrast with *Squire*.

⁴² *Bowers*, 591. See also Erle J in *Ingram*; and Maule J in *Sharman*.

⁴³ Similarly, in *Riley* it was the nature of the task and the status of the parties from which were derived the terms of the contract.

⁴⁴ (1757) 31 George II, c. 11, s. 3.

⁴⁵ *Lancaster*, 631-2, confirmed in *Ex Parte Gordon* (1856) 25 LJMC 12, 14.

⁴⁶ See chapter 3, and *R v Welch*, Lord Campbell CJ; *Pilkington*.

would fail for 'want of mutuality.'⁴⁷ By the mid-19th century, however, the courts would imply such a promise from evidence of regular work, constituting the wage-work exchange itself as a contract of service so as to provide employers with a right to his worker's ongoing service. In theory, this went hand in hand with a right for servants to be provided with regular work from which to earn a (market) wage.⁴⁸ In fact, however, for much of the 19th century the courts proved reluctant to enforce the implied obligation to provide work in favour of workers, particularly when it came to claims for wages in respect of periods of lay-off.⁴⁹ However embedded ideas of mutuality were within labour law discourse, the idea that service went hand in hand with some form of right to subsistence, the courts had not yet given expression to these ideas through a relational conception of the contract of service.

It is clear, however, that employment status for the purposes of the Master and Servant Acts was highly dependent upon the courts embracing an active constituting role, implying a contract of service where, in light of its implications in the context of the statutory framework, this was something to which it was assumed the parties were entitled. During this period, we can still see two distinct ideas of mutuality, therefore, one going towards establishing the basic right to wages to which all workers were entitled, the other towards establishing the specific protections associated with ideas of service. Thus, mutuality in the primary consideration sense referred to the requirement that labour have been provided pursuant to a reciprocal exchange, a condition for statutory protection for wages, while mutuality in the relational sense expressed the premise that the courts ought to provide employers with a right to ongoing service and to provide in exchange some form of proxy for the industrial servant's right to be maintained.

7.2.3 The Late 19th and Early 20th Century

⁴⁷ *Lees v Whitcomb* (1828) 130 ER 972; *Sykes; Aspdin v. Austin* (1844) 114 ER 1402 5 Q.B. 671, *Dunn v Sayles* (1844) 114 E.R. 1408; 5 QB 685.

⁴⁸ *Re Bailey; R v Welch; Whittle* (1862) 2 B & S 49. Contrast with those paid a fixed salary for service. Here the salary provided sufficient 'mutuality' such that the courts refused to imply an additional obligation to provide work: *Collier v Sunday Referee Publishing Company Ltd* [1940] 2 KB 647,50; *Lagerwall v Wilkinson, Henderson & Clarke* (1899) 80 LT 55 , and *Turner v Sawden* [1901] 2 KB 653; *Midland Counties District Bank, Ltd. v. Attwood*, [1905] 1 Ch. 357 , 362.

⁴⁹ *Williamson v. Taylor* (1843) 5 QB 175.

The Employers and Workmen Act 1875 replaced the penal provisions of the Master and Servant Act with a special power for the magistrates to impose fines for breaches of work-discipline and to require specific performance of the contract of service.⁵⁰ Thus, although long-term hirings were becoming less common, and criminal penalties for breach of contract removed, the Act continued to provide employers with a mechanism to compel ongoing service from the contract by which labour was sold for wages.⁵¹

The Act applied to ‘workmen,’ defined as ‘any person (except domestic servants) who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in *manual* labour...has entered into or works under *a contract* with an employer...express or implied, oral or in writing... a contract of service or a contract personally to execute any work or labour’⁵² This definition was later adopted in the Employers' Liability Act of 1880, and the Workmen's Compensation Act of 1897, although the latter dropped the requirement for manual labour.⁵³

In 1940, the term ‘artificer’ in the Truck Act was replaced with the term ‘worker,’ defined by reference to the definition of ‘workman’ in the 1895 Act, and from this point onwards, the term worker became the primary term to be used to denote dependent employment in protective labour legislation.⁵⁴ Higher status salaried employees were, by contrast, at least until the term ‘employee’ began to be used (e.g. in the Contracts of Employment Act 1963), deemed to be beyond the scope of protective labour law.⁵⁵ For the purposes of the Employer and Workman Act this was because the term ‘labourer’ invoked in the definition of ‘workman’ was said to exclude those engaged in ‘a higher class of labour’ such as ‘developing ideas....in furtherance of the business of the firm.’⁵⁶ Elsewhere, this was achieved both through the courts' interpretation of the term worker, as ‘presupposing a position of dependence’ and certain ex-

⁵⁰ Section 3.

⁵¹ On changes in work organisation during this period, see: Deakin and Wilkinson 2005 ,77-8.

⁵² Section 10.

⁵³ Section 7.

⁵⁴ Section 29(3). The only Acts that retained the reference to manual labour were the Truck Act (1940) and the Employer and Workmen Act of 1875.

⁵⁵ This paralleled the differential tax treatment of higher-status employees and wage-workers. See: Harvey 2018.

⁵⁶ *Jackson v Hill & Co.* (1884) 13 QBD 618, 622.

press statutory exceptions excluding those earning above a certain threshold from the scope of protection.⁵⁷

By the middle of the 20th century, the worker definition became the standard approach to defining the scope of protective labour legislation, modified, or qualified by various express exclusions depending upon the nature of the rights in the Act in question. For example, under the Wages Councils Act, although there was no requirement for a contract of service, the Act nonetheless excluded 'any person who is employed casually' as well as those employed 'otherwise for the purposes of the employer's business.'⁵⁸ Because the Act provided an ongoing right to be paid that was independent from time-working, it presupposed a relationship whereby a single employer enjoyed the benefit of the worker's ongoing service, and it was this that these statutory exceptions had intended to achieve. For this reason, the courts were open to the possibility that 'an outworker working on his own account and without a team and working exclusively for a particular [employer] might well be an employee [sic] although an outworker as well.' This ultimately depended on where the balance lay between 'service and servitude' and 'independence and freedom' when all the circumstances were considered.⁵⁹

In industries such as catering where casual labour was particularly common, Parliament tied the scope of the right to minimum wages to the performance of a particular type of work, rather than to the existence of an ongoing relationship involving the provision of labour. Thus, it applied to workers 'employed' in an undertaking involved in 'the supply of food or drink for immediate consumption, the provision of living accommodation for guests or lodgers' and expressly provided that 'for the purposes of this Act, any worker who, for the purposes of any undertaking or part of an undertaking, performs any work in pursuance of an arrangement express or implied made by the worker by way of trade with the persons carrying on that un-

⁵⁷ *Simpson v. Ebbw Vale Steel, Iron & Coal Co* [1905] 1 KB 453, 458 and *Gordon v Jennings* (1882) 9 Q.B.D. 45. The National Insurance Act 1911 excluded those whose remuneration exceeded £160. The Workmen's Compensation Act 1906 s.13 adopts the same definition of worker but excludes those whose remuneration exceeds 200 pounds and whose employment is of a 'casual nature'.

⁵⁸ Section 23(1). See similarly: Workmen's Compensation Act 1925, section 3(2)(b).

⁵⁹ *Westall Richardson v Roulson* [1954] 1 WLR 905, 909 (obiter).

dertaking shall be deemed to be employed by them in that undertaking or part.’⁶⁰ In *Pauley v Kenaldo* (1953) this meant that a cloakroom assistant that was not ‘employed’ under a contract of employment but was nonetheless engaged in the work to which the minimum rate was applicable, fell within the scope of the Act, the casual nature of the arrangement notwithstanding.⁶¹ This approach broadly followed the approach taken in the Trade Board Acts where the courts allowed workers to claim the minimum rate whenever the type of work typical of the trade had been provided. This meant that casual workers, and even outworkers who employed a number of other outworkers were entitled to the minimum rate, notwithstanding the lack of any ongoing employment relationship.⁶²

For much of the 19th century, beyond the Factory Acts whose scope was determined by reference to enterprise-type, and the Truck Acts which applied to (most) manual workers, labour legislation had been concerned primarily with re-enforcing employers’ control over workers in production, providing them with a mechanism for compelling into service those who merely sold their labour power for wages. By the mid 20th century, however, this function was increasingly being performed by a relational contract of service.⁶³ The result was to exclude from the scope of labour protection persons hired on a casual basis, those unable to bargain for a relational contract and who, as a result, were deprived of the stable and continuous employment that the contract of service now provided. It was in order to address this problem that Parliament introduced the new statutory concept of the employee.⁶⁴ The effect of this was to extend to all the employed, those providing work personally, the relational model of the contract that had once been the preserve of the higher-status salaried employee, paralleling developments taking place in tax and social security legislation.

The first statute to use the term ‘employee’ to circumscribe the scope of labour legislation was the Contracts of Employment Act 1963. This introduced the right to notice and to a writ-

⁶⁰ Catering Wages Act 1943, s.1(2) and 1(4).

⁶¹ *Pauley v Kenaldo* [1953] 1 WLR 187.

⁶² *Street v Williams* [1914] 3 KB 157; *Skinner*; This also meant that if the worker was paid piece-wages and was not given sufficient work to enable him to earn the minimum basic piece-rate, the court would imply an obligation to pay a higher rate per-piece: *Nathan v Gulhoff and Levy* [1933] Ch. 809.

⁶³ See, for example, the courts’ interpretation of the contract in: *Parkin v. South Hetton Coal Co.* (1907) 98 LT 162, 164; *George v Davies* [1911] 2 KB 445 and *Hanley*.

⁶⁴ The source for this appears below in the Hansard reference to the debates behind the Contracts of Employment Act 1963.

ten statement of particulars that is now embodied in section 86 and section 1 of the Employment Rights Act (ERA).⁶⁵ The Act reproduced the definition of the ‘worker’ used in previous statutes, but now referred to these persons as ‘employees.’⁶⁶ These were persons who, providing their labour pursuant to a contract in the generic sense, were now to be deemed in law to be hired under a relational contract of employment. If there was evidence that labour had in fact been provided continuously over a particular period of time, or that labour was being provided in a context in which ongoing service was mutually expected, workers would be able to claim this new employee status and, after accumulating the requisite continuity of service, the statutory rights to which that contract gave rise.

‘[The Bill] offers the worker a legal contract of employment, something he has never had before. Of course, many employers give their employees a contract and some measure of security. All employers, however, are not good employers. And, in any case, it is a new thing that they are now legally entitled to a contract which sets out not merely the period of notice but conditions relating to holidays, sick pay, pension rights and many other things’ ...’We want to *bring about a situation* in which hardly anyone working in this country can be dismissed at a few hours’ notice.’⁶⁷

The Act explicitly envisaged a constituting role for the courts, implying from an exchange of work for wages a relational contract envisaging ongoing performance.⁶⁸ It was only if the parties’ mutual expectations were inconsistent with this that the claim to employee status would fail, the burden being on the employer to prove that an implied right to notice was inconsistent with the parties’ expectations.⁶⁹

The statutory requirement for a minimum period of continuous service was separate from the question of whether a contract of employment could be implied. It was introduced to preserve

⁶⁵ Sections 1 and 4.

⁶⁶ Section 8(1).

⁶⁷ HC Deb 01 May 1963 vol 676 cc1092-115, 1096, per Mr Prentice.

⁶⁸ HL Deb 21 June 1963 vol 250 cc1494-528, 1516, per Lord Robertson.

⁶⁹ HC Deb 01 May 1963 vol 676 cc1092-115, 1103, per Mr Diamond.

the important role that probationary periods were deemed to perform for both workers and their employers, enabling both parties to end the relationship at will where the job, or the worker, proved unsuitable. It was stressed, therefore, that the question of continuity was not concerned with the separate issue of status, but was ‘an argument about when a man has passed his period of probation and ...an employee having passed his period of probation, it is only a question whether the employer can look ahead for one week.’⁷⁰

The Industrial Relations Act 1971 reduced the 26-week qualifying period established in the Contracts of Employment Act to 13 weeks and introduced a new statutory right for all ‘employees’ not to be unfairly dismissed after 104 weeks’ continuous service.⁷¹ The right to unfair dismissal was to be treated separately from the collective labour rights provided for elsewhere in the Act, rights which applied to all ‘workers’. The Act thus drew an implicit distinction between those in regular and stable employment, able to claim rights under the Wages Councils Act (individuals providing work who were not employed on a casual basis in industries to which Wages Orders applied), the Contracts of Employment Act (employees), and Unfair Dismissal, and those who provided work and wages on a one-off or intermittent basis to whom a much more limited set of rights applied, rights concerned most directly with working conditions and the terms upon which labour was provided in the market.

In the debates surrounding the passing of the Act the government argued that although the worker concept had Victorian connotations, ‘we have to include employees in the literal sense, *and* those that come under a contract of service.’⁷² This was because there was no justification for limiting collective labour rights, nor the restrictions on their exercise, to employees. Instead, such were to be extended to all those *employed*, those who normally work, or seek to work ‘under a contract of employment...or any other contract (whether express or implied, and, if express, whether oral or in writing) whereby he undertakes to perform personally any work or services for another party to the contract who is not a professional client of his.’⁷³

⁷⁰ HC Deb 01 May 1963 vol 676 cc1092-115, 1103, per Mr Diamond.

⁷¹ Section 19(1) and section 28.

⁷² HC Deb 14 December 1970 vol 808 cc961-1076, 964, per Mr Carr.

⁷³ Section 167 (1).

In this way, the ‘employee’ concept was coming to include both the ‘servant’ under a contract of service and the ‘intuitive’ employee, the higher status managerial or professional, salaried person. However, once this shift had taken place, this new unitary concept of the employee had to be distinguished from the somewhat larger group of workers who included many of those we now call limb (b) workers. The latter needed collective rights but could not easily be made to fit into the employee concept once dismissal rights were strengthened. The result was that a link was being established between ideas about the subsistence wage and a *stable and continuous model of employment* – one to which the broader institutional framework has been becoming increasingly hostile over time.

In 1986 when the Wages Act was being debated, the definition of ‘worker’ caused considerable concern. The Industrial Relations Act’s definition of the worker, as re-enacted in the Trade Union and Labour Relations Act 1974, was substantially the same as the formulation adopted in previous Acts, but had added the proviso ‘is not a client or customer of any profession.’ In 1986, the government sought to add the further phrase ‘*or business undertaking carried on by the individual.*’ This substantially mirrored the requirement in the Wages Council Act that the individual not be providing work ‘other than for the purposes of the employer’s business.’ The idea, according to Lord Trefgarne, was to ensure that ‘anyone who is employed by someone else would be protected...but if the person doing the work is doing so as part of a business he is running he should not be covered by the protections of the Bill.’⁷⁴ The Government believed that with this qualification, the definition would be adequate to incorporate all but the genuinely self-employed.⁷⁵ This is the definition we now find in the ERA (the limb (b) worker), the National Minimum Wage Act 1998 and the Working Time Regulations 1998-9.⁷⁶ This is the legal framework that forms the background to the discussion of the two types of mutuality of obligation explored in the previous section.

⁷⁴ HL Deb 24 June 1986 vol 477 cc228-74, 263.

⁷⁵ HL Deb 24 June 1986 vol 477 cc228-74, 264, per Lord Wedderburn.

⁷⁶ Working Time Regulations, SI 1998/1833; 1999/3372.

Both ideas of mutuality, in the sense of reciprocity or consideration, and in the relational sense associated with the right to subsistence, can be found during the period from the 1960s to the 1980s, although the statutory requirement for continuity somewhat blurred the distinction between them. Following the introduction of the new employee status in 1963, it was relatively clear that the statutory concept of worker continued to be synonymous with the dependent employed. These were persons who could prove mutuality in the primary sense, that they provided their labour in exchange for wages. Many of these workers would also be able to claim that they were employees hired under a contract of employment, however, if they could prove that they had, or were expected to, provide that labour on an ongoing basis.

By the end of the 1970s, therefore, ‘mutuality’ as a condition for access to labour law implied simply that labour, rather than some contracted for result, had been provided pursuant to a contract in the generic sense of some form of reciprocal exchange. The form of the contract was largely irrelevant, therefore, provided that labour power had been provided in exchange for some form of remuneration.

Beyond this idea of mutuality as consideration, mutuality of obligation was not a term that was used by the courts when it came to questions of status. Instead, the *idea* of mutuality of obligation was embedded in the broader function that protective labour legislation had emerged to perform, with the contract of employment the juridical technique through which it did so. In exchange for the ongoing service that at one time coercive labour legislation, and later the relational contract, had provided, labour and social welfare legislation had secured certain protective rights that were ‘mutual’ to the employer’s rights in service, rights which together went towards providing workers with a form of subsistence wage.

Prior to the 1980s, the contract of service was not itself seen to be *by its nature* continuous, in that the statutory criteria for continuity continued to be treated independently from the question of status. Thus, although judges accepted ‘that the relationship of master and servant is normally conceived of as a continuous relationship, and ...that there is a series of contracts is more consistent with those contracts being contracts for services than contracts of service’

they would nonetheless typically ‘doubt whether this factor can usefully be considered in isolation’.⁷⁷

It is not clear from this how far the introduction of the limb (b) worker explains the more restrictive interpretation of the employee concept that the courts adopted from the 1980s. Nonetheless, prior to the decision in *O’Kelly* at least, the distinction between an exchange of work for wages, and an exchange of ongoing service for remuneration and social protection, seemed to reflect a distinction between the *empirical reality* of employment for many manual workers, and the *normative consequences* of the rights and protections that the legal system (albeit selectively) conferred upon them by way of compensation. In this sense, the ongoing or relational aspect of employment was a *function* of the contract of employment that was implied in order to provide workers with a more stable income and regular employment. It was not, therefore, a condition for labour protections, a test for establishing employment status in the first place.

7.3 Reconsidering Mutuality of Obligation

This chapter has shown that prior to the 1980s, there existed two distinct ideas of mutuality in labour law discourse and these different ideas can be seen in the distinction that developed between the worker, the ‘employed’ person who sells his labour for wages, and the employee, a worker who provides an employer with ongoing service.

Prior to the 1980s, mutuality in the relational sense associated with the employee concept was neither an express legal doctrine invoked by the courts, nor a condition for claiming labour rights. It reflected a distinct legal idea, an assumption embedded in the legal conception of service, that the employment relationship *should* give rise to particular mutual rights and obligations. The premise behind the concept was that employers *ought* not be able to benefit from a worker’s ongoing service unless they provided in exchange some form of subsistence wage. In the medieval period this had been guaranteed through the servant’s legal right to be maintained, a right that was ‘mutual’ to the employer’s right to exclusive service; in the 19th

⁷⁷ *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173, 187 per Cooke J.

century it had been provided (imperfectly) through the employer's obligation to provide work in exchange for his rights to compel service under the master and servant legislation, and in the mid 20th century, through the worker's right to contractual remuneration and to the labour and social protections arising from the relational contract of employment.

Today, therefore, the distinction between workers and employees cannot be fully understood without engaging with the historical ideas of mutuality and tenure that have shaped how dependent labour and the contract of service has been conceived. 'Workers' should be seen as a broad category that includes all those who provide labour power in exchange for some benefit, and who, as a matter of law, have a right to be paid a market wage. This is today (imperfectly) provided through a combination of in-work benefits, minimum wage entitlements and statutory protections against deductions. The term employee, by contrast, refers to those workers whose working arrangements are such as to give rise to mutual expectations of ongoing service, and as a result are deemed in law to be hired under a contract of employment, the legal mechanism through which a form of subsistence wage is today guaranteed. The employee is thus the form in which those who provide their labour for wages would appear were an active constituting role for law to be embraced, implying a contract of employment with a view to providing casual workers with greater stability and protection.

This active constituting role requires a recognition that legal rules can, and must, *shape* social relations in light of labour law's broader function, that there are no 'economic laws' that prevent the legal system from imposing costs on an employer to which he might not otherwise agree. Despite an increased willingness to look beyond the written terms of the contract, evidenced by cases such as *Autoclenz v Belcher* 2011, the courts rarely go this far. Instead, they still see their role as *identifying* the parties' agreement, it is simply that to do so they are willing to look beyond the written terms of the contract where an inequality of bargaining power can be presumed.⁷⁸

⁷⁸ *Autoclenz v Belcher* [2011] I.C.R. 1157; *Quinn v Integrated Services v Jones* UK EAT/0301/16/JoJ; *Dewhurst v Citysprint* UK Ltd ET/220512/2016; *Aslam*.

‘...the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem.’⁷⁹

This ‘purposive’ approach stops short, therefore, of recognising a role for the courts in shaping the labour relationship, acknowledging that there are certain inderogable mutual rights and obligations that are implied into labour relationships in light of labour law’s broader function. For this reason, the approach will not help claimants such as *Quashie* when arguing that they have a right to be paid wages (minimum or otherwise) if the contract envisages a system of entirely tip-based pay when this is also entirely consistent with what happens in practice. This approach does *not* attempt to narrow the gap between the social reality of work for those employed on a casual basis, and the normative ideal of stable and continuous employment, therefore, but instead merely aligns the terms of the written contract with how the parties conduct themselves in practice. For this reason, what matters is ultimately the agreement; the courts ‘do not consider *expectations* to be relevant’ to questions of status.⁸⁰

Clarifying the distinction between the different ideas of mutuality of obligation that are today often confused in the case law, and as such, the line between the worker and the employee, requires a much more active role than this purposive approach reflects, one which more closely resembles the role which the courts have historically played when it comes to questions of status. Mutuality as a ‘test’ for employment status requires simply that labour, rather than a job or task, have been provided pursuant to a form of reciprocal exchange transaction. This *is* a condition for worker status and the absolute right to wages, but the focus of the enquiry is the nature of the rights claimed by the employer, and the socio-economic circumstances in which work is performed, rather than the terms of the agreement.

⁷⁹ *Autoclenz* at [35]. *Firthglow Ltd v Szilagyi* [2009] ICR 835, per Smith J; *Consistent Group v Kalwak* [2007] IRLR 560, at [57] per Elias J.

⁸⁰ *Lange & Ors. v Addison Lee* ET: 2208029/2016 at [48].

Mutuality in the relational sense, by contrast, despite being perceived and used today as a test for establishing employment status, expresses a deeply embedded idea about how labour law *ought* to constitute labour relationships envisaging ongoing service. It is thus the normative ideal towards which labour law must strive in order to shape employment relationships in a way that guarantees the long-term sustainability of capitalist wage-labour and the market. This idea might have guided a court faced with a casual working arrangement, for example, to imply a contract of employment so as to provide these workers with greater stability and protection.

Instead, however, the effect of the courts' approach to statutory interpretation when combined with the structure of statutory wage protection and the NMWR is that even if worker status has been proven, many casual workers will be unable to claim anything resembling a subsistence wage. Deprived of a contractual right to remuneration, and deemed to be engaged in 'unmeasured work' for many such workers, 'allowable deductions might take a driver [or worker] below zero in any pay reference period.'⁸¹ The alternative approach, returning to the position in the early-mid 20th century, by contrast, would be for the courts to imply an obligation to pay either a higher piece-rate or to provide a minimum amount of work, so as to reach not the statutory minimum wage, but a guaranteed minimum income from employment - shaping employers' incentives by making it costly to engage casual workers and encouraging them to offer regular and continuous employment.⁸²

The mistake today is to assume that those whose contracts deny them, or those who do not enjoy in practice, the mutual rights and obligations associated with the normative ideal of the contract of employment, are any less in need of the type of protection that the contract provides. Placing the historical idea of mutuality at the heart of decisions over status, the basic premise that those who provide their labour to others *ought* to benefit from a legally guaranteed subsistence wage, can thus help to refocus the courts on the broader issues at stake. This, it seems, would be much welcomed by some of the courts, given that 'there is no doubt that

⁸¹ *Addison Lee* at [59]

⁸² See: *Nathan v Gulhoff and Levy* [1933] Ch. 809.

this is an area that is crying out for some legislative intervention, not least because.... the exercise in these cases, so far as tribunals are concerned, is highly artificial.’⁸³

There is thus a need, and a willingness on the part of the courts to play a more active role today, but what is required now is an attempt to go beyond identifying the terms of the ‘real agreement,’ actively constituting labour relationships in a form which is both socially and economically sustainable. By revealing some of the tensions embedded in legal concepts such as the ‘worker’ and the ‘wage’, and the potential of others, such as ‘remuneration’ and ‘mutuality of obligation’ this thesis has helped to clear the ground for such a development to take place. For this to be possible, however, Parliament too will have to embrace for itself a much more active constituting role, particularly when it comes to the legal regulation of wages. However important might be questions of employment status, reconsidering the legal system’s role in the setting of and protection of ‘wages’ is just as important when it comes to securing workers a subsistence wage. Because the idea of the subsistence wage is very much linked with a model of long-term, stable employment, however, it may be that reforming the statutory definitions will be of little assistance *in itself*, until, that is, broader steps (e.g. changes to social security law to remove the pressure to take up casual jobs, and a demand-oriented macro-economic policy) are taken to promote more stable employment.

⁸³ Saha.

CHAPTER EIGHT

Conclusion

This thesis has drawn on the theory and method of social ontology to shed light on why labour law struggles to provide for wage security and clarity of employment status today.

This question was addressed using three different levels of analysis. First, drawing on the critical realist approach to social ontology, the thesis directed attention to the role a genealogical analysis can play in clarifying legal concepts, helping to clear out misunderstandings that become embedded in concepts such as the ‘wage’ and the ‘employee’ over time. This helped reveal some of the constraints, as well as the potential, embedded in these concepts, shedding light on how they might be reconstructed and deployed more fruitfully today.

Second, the genealogical analysis, by directing our attention to the conceptual language used to describe and construct employment relations, helped shed light on the legal system’s own ontology, the implicit position it takes on the nature of social reality, and the law’s relationship with it. In so doing, it revealed that whether the legal system sees its concepts as shaping or constituting, as opposed to merely responding to, capitalist social relations, influences the effectiveness of law in practice.

The third level of analysis involved exploring the broader question of labour law’s relationship with the capitalist system. It showed that there is an important link between the problems of low pay and unclear employment status and the structural features of the capitalist mode of production. These problems are inseparable from the tension inherent in the capitalist system, between the freedom and equality implied in exchange relations, and the substantive inequality inherent in production. This tension is a reflection of the broader conflict that exists between the process of capital accumulation and the process of social reproduction, one which, the thesis has shown, finds its expression in two competing conceptions of the wage.

In Chapter one, philosophical social ontology was used to explore law's role in constituting the market. The analysis suggested that there are good reasons to believe, theoretically, that law plays a constitutive role in the market, and that there is an important cognitive dimension to this process as well as the material one which operates through the practical application of legal rules and sanctions. By expressing, through its discourse, a particular cognitive framework, law can shape how individuals conceive the world, influencing their practices, and how society evolves. This framework takes a particular form in capitalism, moreover, by reason of the structural features of the capitalist system that are bound up with the generalisation of wage labour and the ubiquity of exchange. Emerging from, and being shaped by, social practices and beliefs, the legal system's conceptual architecture thereby bears a close resemblance to the assumptions intrinsic to market practices and exchange under conditions of capitalism. It may be that legal discourse can shape social practices, therefore, as it is drawn on by actors in the course of their interactions, but if it is to be effective in co-ordinating behaviour, it cannot deviate too far from every-day practices and beliefs, from the way the world is conceived from the internal perspective of the market. This point of view suggests that the reproduction of certain dogmas, embedded in concepts such as the legal subject, the state, property, and contract, are essential to the legal system's capacity to influence behaviour.

The rest of the thesis built on the insights from Chapter one to explore, at a more concrete level, the form and function of the concept of the wage. In particular, it sought to shed light on whether, and if so, how, labour law can uphold or express the conception of the wage as price, while nonetheless ensuring that this wage takes effect in practice as a legal obligation to pay a sum that reflects the costs of subsistence. Integrating these two, potentially conflicting models of the wage, it concluded, is highly dependent on how far the legal system embraces a constitutive role for itself, taking seriously its capacity to shape employment relations by constituting the parties' rights and obligations in a particular legal form.

Chapter three showed that during the medieval and early modern periods, the courts developed their ideas of wage labour by reference to a particular form of property relationship characterised by 'tenure.' The defining characteristic of such relationships was that one party sought to exercise exclusive control over a valuable social resource in which the owner and

the community retained an interest. By imputing to such relationships a contract of service, the courts had made it possible to constitute those relationships in a form in which certain obligations of fair-use and protection could be guaranteed. The result was that, by the end of the 17th century, it was largely taken for granted that the servant's right to subsistence, implied in, but payable independently from, the wage, was an implied condition for the employer's rights in labour.

During the 18th and 19th centuries, the idea of tenure as the foundation of a subsistence wage was eroded. In its place there emerged the idea of a wage as a payment made to a worker for an alienable commodity. In this context, what the worker needed to subsist came to be equated with the market wage itself, and it was this premise that came to be embedded in early minimum wage legislation. Throughout the course of the 20th century, however, the courts rediscovered the constitutive role that law had played prior to the emergence of the modern labour market, and these ideas began to shape how minimum wage legislation developed during, and following, the Second World War. This shift can be seen, for example, in the concept of remuneration, the premise that in exchange for ongoing service, the employer *ought* to pay a sum capable of adequately maintaining him, and in the *ideal* of mutuality of obligation as something to which the contract of employment should aspire. Rather than being seen as a test for employment status, therefore, mutuality of obligation was the ideal to be realised by imputing to employment relationships a specific form of contract, allocating certain rights and obligations so as to provide both parties with greater stability and protection.

Since the 1980s, however, this framework and the legal system's conception of its ontology that underpinned it, has begun to break down. This is evident from the passive or reactive role that the courts take both to questions of status, and when determining the nature and scope of the worker's right to be paid. Its practical effects can be seen in the erosion of the distinction between 'wages', 'salaries' and 'remuneration'; the confusion that exists in relation to the scope of the worker's right to be paid; the structure of the National Minimum Wage Act and Regulations; and in the confusion that has arisen in relation to the role that mutuality of obligation plays in relation to questions of status.

Despite this process of ‘disintegration,’ many of the ideas embedded in these concepts, such as the notion of the subsistence wage, remain deeply embedded in the structures of the contract of employment. One of the benefits of the genealogical approach, therefore, has been to help reveal the potential of legal concepts such as ‘remuneration,’ ‘tenure’ and ‘mutuality of obligation’, shedding light on how they might be reconstructed and re-used today in a way that might better realise the ideals they express. True, it may be that to fully realise this potential, changes to the broader institutional environment will be required. In particular, the current social security regime and the preference for supply-side macro-economic policy is such that the legal environment actively fosters the creation, and taking up of, casual forms of work. Nonetheless, how employment is conceptualised in legal discourse and how the legal system sees its role in shaping social and economic relations, plays an important role in making different policy proposals seem more attractive, feasible, and worthwhile. Making explicit the ontological assumptions underpinning labour law analyses, while revealing the complex genealogies of legal terms, can thus be particularly useful for informing the process of legal reform.

The thesis has shown, therefore, that labour law’s effectiveness, whether judged by reference to a particular policy objective, or how well labour law provides for social reproduction, is profoundly influenced by the conception of law’s ontological status that we find embedded in legal discourse. Even if individual judges might not think in ontological terms, how the courts and Parliament see the relationship between law and the social reality of employment has important practical effects. For this reason, it is important that these and other legal actors remain conscious of the legal conditions that make it possible for the market to appear as the self-regulating system, and the wage as the ‘objective’ price, that is presupposed within economic theory. They should not lose sight, in other words, of the distinctive social reality of law, and the limits this places on the legal system’s capacity to guarantee these conditions in practice.

Rather than seeing legal concepts as social tools that can provide direct solutions to social ‘demands,’ therefore, policy-makers and the courts must engage with the nature of the legal system’s internal evolutionary dynamics, and its relationship with the structural features of

the capitalist system. This means taking seriously the values embedded in its higher-level concepts, recognising the scope that exists for path dependence and lock-in to constrain the path of the law. By improving our awareness of these constraints, shedding new light on the relationship between law and capitalist society, this thesis has laid the groundwork for a much more active, constitutive, and reflexive approach to the formulation and application of labour law.

The task going forward is to draw on these insights to think about how this new understanding of law's ontology, and its relationship with the structures and relations of capitalism, can help us when it comes to thinking about how we might go about addressing the problems of low pay, and unclear status today. It is thus worth revisiting some of the original contributions that this thesis has made and some of its implications for the future.

First, the thesis has clarified the meaning of the legal concepts of the 'wage', the 'salary' and 'remuneration' and has demonstrated the importance of maintaining a clear distinction between them, bringing clarity to the law.

The 'wage' is often used in legal discourse to express the requirement for consideration for a legally enforceable labour contract. Historically, the importance of the concept of the wage comes from its significance as a symbol of freedom, distinguishing free wage-labour from unfree labour at a time when it was necessary to clearly identify which labour relations were 'free' and so within the purview of the law. Today, the same premise finds its expression in the requirement for a 'wage-work bargain' as the 'irreducible minimum of obligation' for a contract (relevant to the employment field). Here, the wage expresses the reciprocal nature of the transaction by which labour is provided, and so need not take monetary form.

In its more specific sense, however, the term 'wage' connotes the payment due by an employer to a worker in exchange for labour rendered. Throughout the history of labour law, the courts have placed the emphasis on different aspects of this definition, on the importance of the payment being a monetary one, on the importance of it expressing the value of labour rather than the price of a contract, and more recently, on the importance of the payment being

made by an employer (rather than a customer or third-party). In each case, however, its meaning corresponds with the idea of the 'market wage' as the price of a commodity, the right to which has long been something that the legal system sees as absolute, with its content 'objectively' determined. Prior to the Wages Act, therefore, it was not a right that could be waived or varied by agreement.

Consistently with this, prior to the 1980s, the concept of the wage was largely confined to legislation concerned with the regulation of the market, with the terms on which labour (power) is bought and sold. For this reason, it tends to have a narrow meaning, excluding payments due in connection with employment, confined to those which form part of the private costs of labour. Its use in minimum wage legislation thus tells us much about the nature and the scope of the rights provided, doing little more than provide a right to be paid a competitive market wage that takes no account of considerations about the costs of living.

The 'salary', by contrast, is a contractual payment that is made to professional employees for their ongoing service. Previously the preserve of public-office holders and independent professionals, it is today something that is paid to employed professionals hired under an executory contract of employment. In contrast to the wage, it is a regular payment that vests periodically throughout the year and, envisaging ongoing service, is conditional only upon the continuance of the contract. For this reason, prior to the 1980s, it was not necessary to prove that the employee had actually worked to claim it. It could thus only be withheld if the relationship was terminated mid-way through the payment period, at which point *only* questions of substantial performance would arise, and the Apportionment Act would, *prima facie*, apply.

The term salary has lost its distinctiveness, however, and is often used today as a short-hand for the annual wages payable to a worker under a contract of employment where working hours are clearly defined. The Supreme Court's decision in *Hartley* is problematic, however, for while recognising the distinction between these conceptions of the salary, it nonetheless invokes the Apportionment Act in such a way as to blur the line between them. It remains to be seen what effect this will have on the future of the salary as something that plays an im-

portant role in compensating professional employees for the high expectations that employers have of them as skilled members of a profession.

The concept of contractual ‘remuneration’ plays a particularly important role in modern labour law. It refers to the total benefit due to a worker in connection with his employment, encompassing but going beyond the wages or salary as defined above. Remuneration corresponds with the employer’s executory obligation to pay for the worker’s ongoing service, and so cannot be unilaterally withheld. Like the salary (traditionally), therefore, it must be paid irrespective of whether or not the worker is in breach of contract. This means that the burden is on the employer to bring a claim for damages in the event of a breach, such that he must be able to prove both breach and loss. Prior to the House of Lords decision in *Miles*, this right had provided important protection for the worker’s right to be paid, preventing him from being faced with a unilateral deduction which could only be contested through costly litigation in a claim for unauthorised deductions from wages.

In contrast with the wage, therefore, the terms salary and remuneration have a more protective ambit and tend to be found in legislation concerned more directly with the rights and obligations of the parties to the employment relationship, rather than with the terms on which labour is sold in the market. This is because they are both more directly concerned with guaranteeing that an employer’s rights to far-reaching obligations of ongoing service go hand in hand with the employee’s right to subsistence, than they are with securing that labour’s objective market price is paid. Their use in minimum wage legislation during the mid-20th century was significant, therefore, for signalling a move away from a system of market regulation towards a system designed to, and better capable of, securing workers what might today be called a ‘living’ wage.

These observations lead to the **second** significant contribution of this thesis, namely, revealing a number of alternative possible models for minimum wage regulation, some of which are more effective than others when it comes to securing workers’ subsistence. These models are, moreover, entirely consistent with the assumptions embedded in English labour law, because they have been unearthed and reconstructed from legal materials that continue to be embed-

ded in labour law discourse today. By highlighting the distinctiveness of the Wages Council model, therefore, the thesis has shown that there is a practical alternative to today's framework, based as it is on a link between work and wages, that would be better capable of providing protection against low and precarious pay. The collective bargaining focus of the Wages Council Act often obscures the other significant element of the system, that the right to be paid was a right to reasonable minimum remuneration that was tied to employment rather than a given quantum of labour. Because this thesis has highlighted this aspect of the Act, and the legal framework underpinning it, the potential of the concept of remuneration can now be drawn upon today so as to reframe what is now a right to be paid minimum wages for work, in the form of a right to a guaranteed minimum income and/or minimum hours of work. The benefit of drawing on the concept of remuneration in this way would be to help extend to those that provide labour on a casual basis a right to more stable and continuous employment and, in this way, go further towards providing a form of subsistence wage.

Linked with ideas of subsistence is the **third** important contribution of this thesis – showing how engaging with the role that property law has played, and continues to play, in labour law can open up new ways of thinking about how to better protect workers' interests today. The thesis has shown, for example, the important protective function that feudal ideas of tenure have played within labour law, and how drawing on the structure of the leasehold relationship might shed light on why an employer *ought* to provide for a subsistence wage. By emphasising the qualified nature of the property acquired by the wage, the concurrence of the employer's, the worker's, and the community's interests in labour, the thesis has helped to explain why it is justified to condition the employer's rights to use a worker's labour on his obligation to provide for his maintenance and protection. This is so even if the effect of doing so is to squeeze (what are ultimately inefficient) firms out of the market. By highlighting this point, the thesis shows quite clearly why principles of contract law are insufficient to adequately protect the interests at stake. The genealogical approach adopted has helped to reveal that these property law ideas are already buried within the structure of the contract of employment, and so can be revived today. It has thus provided a new perspective on the resources at labour law's disposal when it comes to better providing for workers' subsistence.

Linked with these ideas is a **fourth** contribution, namely, the important contribution that the concept of tenure can make when it comes to thinking about how questions of scope are addressed today. In this respect, the thesis has shown the significance of the juridical *idea* of mutuality of obligation, linked with these medieval ideas of tenure, when it comes to aligning employment status with labour law's broader function. Rather than acting as a barrier to employment rights, the idea of mutuality of obligation can be drawn upon to guide how disputes over status are decided. Reflecting the premise that the employer's right to ongoing service *ought* to be conditional upon the worker's ongoing right to be remunerated for employment - to be paid a subsistence wage - it helps to orient questions of scope around what labour law in general and the contract of employment in particular are trying to achieve within the context of the capitalist system as a whole. The result would be to emphasise the importance of *implying* a contract of employment from evidence that labour was being provided, doing so where ongoing service is *expected*. This approach would provide greater stability and continuity to those unable to secure such stability for themselves, constituting labour relations in a form which is both economically and socially sustainable.

The thesis is not suggesting that the legal form of the contract of employment is the only mechanism through which to operationalise the subsistence wage model explored throughout the thesis. It may be that this model is ill-suited to many modern forms of work-arrangement, particularly while the institutional environment remains hostile to the stable model of employment it presupposes. Nonetheless, by refocussing attention on how questions of status are decided, and by reinforcing the values and ideas embedded in the contract of employment and the historic idea of 'mutuality of obligation', the analysis in this thesis has helped lay the ground for alternative or complementary techniques to develop - techniques that are consistent with the broader integrative function (reconciling the market to the broader social order) that the contract of employment emerged to perform.

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